IN THE

Supreme Court of the United States

October Term, 1973.

No. 73-1556

CULINARY ALLIANCE & BARTENDERS UNION LOCAL 703, AFL-CIO,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

Petitioner, Culinary Alliance and Bartenders Union, Local 703, AFL-CIO, hereinafter called "Petitioner Union" prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on December 13, 1973. Such Judgment affirmed an order of the National Labor Relations Board, hereinafter called "Respondent Board" which concluded that the San Luis Obispo and Northern Santa Barbara County Restaurant and Tavern Association of San Luis Obispo and Santa Maria, California, hereinafter called "ASSOCIATION" was guilty of a violation of Sections 8(a)(1) and (5) of the Labor Management Relations Act, 29 USC Secs. 158(a)(1) and (5). Respondent Board, however, while requiring the Association to bargain collectively with the Union on request failed to comment on Petitioner's request for monetary relief, on behalf of

the employees affected, and the Administrative Judge's denial of the same.

The court in its decision did not comment on Petitioner's request for remand to the Board for the purpose of specific findings on the question of Petitioner Union's right to monetary relief. The court on the question of monetary relief concluded that the conduct of the Association while violative of the Act did not constitute a "clear and flagrant violation of the Law" so as to justify consideration of the imposition of the monetary make whole remedy. *International Union of Electrical Workers v. NLRB* [*Tiidee Products*], 426 F. 2d 1243 (D.C. Cir.) cert. denied 400 U.S. 950; *Textile Workers Union of America v. NLRB*, 475 F. 2d 973 (D.C. Cir.) (Feb. 1, 1973).

On December 13, 1973, Petitioner lodged timely Petition for Rehearing and/or *en banc*.

On January 23, 1974, the Court denied the Petition for Rehearing and the suggestion for rehearing *en banc*.

Opinion Below.

The opinion of the Court of Appeals below is reported at .... F. 2d .... and is attached hereto as Appendix "A". The Petition for Rehearing is attached hereto as Appendix "B". The order denying Petitition for rehearing is attached hereto as Appendix "C". The Decision and Order of the National Labor Relations Board is reported at 196 NLRB No. 155 and is attached hereto as Appendix "D". The intermediate report and recommended order of the Administrative Judge is attached hereto as Appendix "E". The term "A" with a number thereafter refers to pages in the three volume certified transcript of record. The term "Tr." refers to the two volume Reporter's Transcript of testimony.

Jurisdiction.

The judgment of the Court of Appeals was entered on Nov. 30, 1973. The Order Denying a Petition for Rehearing was entered on or about January 23, 1974.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

Questions Presented.

1. Whether the Respondent Board violated its statutory duty imposed by the Administrative Procedure Act, 60 Stat. 237, 5 USC Secs. 555 and 557, and the Labor Management Relations Act, Sec. 10(e) by its failure to state reasons in support of its decision to deny the monetary make whole remedy sought by Petitioner Union on behalf of the employees affected.

2. Whether the Board by its refusal to grant the monetary make whole order violated its statutory duty imposed by Section 10(c) of the Labor Management Relations Act to issue remedies as would effectuate the policies of the Act.

Statutes Involved.

The relevant provisions of the *Administrative Procedure Act* (APA) (60 Stat. 237, 5 USC Secs. 555 and 557) are as follows:

> "Prompt notice shall be given of the denial in whole or in part of a written application, petition or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, *the notice shall be accompanied by a brief statement of the grounds for denial.*" (emphasis added).

The relevant provisions of the *National Labor Relations Act*, as amended (60 Stat. 136, 29 USC 151 *et seq.*) are Sections 8(a)(1), 8(a)(5), Sec. 7, Secs. 10 (c) and (e).

Section 7:

"Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

Section 8(a)(5):

"It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Sec. 9(a).

Section 10(a):

"The Board is empowered to . . . prevent any person from engaging in any unfair labor practice (listed in Section 8 affecting commerce). This power shall not be effected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . ."

Section 10(c):

"The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to

be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action, *including reinstatement of employees with or without back pay, as will effectuate this Act.*" (Emphasis added.)

Section 10(e):

"The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

Statement.

A. The Board's Findings of Fact.

Petitioner Union represents employees working at restaurants, hotels and similar institutions throughout the Counties of Santa Barbara and San Luis Obispo, California. The Association represents some twenty-one (21) restaurants in their dealings with the Union. The Union and Association had been parties to collective bargaining agreements since at least 1965 [Para. 3 (b) of the Complaint, GC Ex. 1(c), GC Ex. 1(e)].

During negotiations for the 1970 Association agreement, the Union had sought an Employee Retirement Plan but dropped that demand in exchange for a one year agreement and a promise from the Association's then negotiator Philip Feick, to get together during the year for the purpose of working out details for the Retirement Plan which would then be included in the next agreement (A. 19). Pursuant to that understanding, Representatives of the Union and Association met in January or February, 1971, and began considering the kind of retirement plan that would be appropriate

[Tr. pp. 51-54]. However, apparently nothing concrete developed from this meeting.

In late April or early May, 1971, William H. Lacy, Business Manager and Secretary Treasurer of Petitioner Union met with Charles J. Mees, President of the Employers' Association, at the latter's restaurant [Tr. p. 48]. Lacy reminded Mees that they had been caught short of time in negotiating for the last Agreement and suggested that they begin the 1971 negotiations early. [Tr. pp. 49-50] (A. 19).

The May 11 meeting was held at the Association's Laguna Village Inn [Tr. p. 55]. Present on behalf of the Union were several executive board members and its financial secretary treasurer, while present for the Employers' Association were the owners or managers of some 5 restaurants. [Tr. p. 56-57].

Charles Mees, the President of the Association introduced William Lacy to the Association spokesman, Labor Relations Consultant Thomas Fair Neblett [Tr. p. 56].[1]

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[1]The Respondent Board in this regard adopted the following findings of the Administrative Judge: At the hearing, Mees disclaimed Neblett's authority to act as spokesman for the Association and its members, testifying that Neblett ". . . just came up and he wanted to appear there and talk to all the members, and see if we thought he was competent," intimating that Neblett was being merely auditioned for the role of labor relations consultant. Neither Mees, nor any of the other Association representatives, however, apprised the Union representatives to this effect, nor did they voice any objection or opposition to Neblett's statements or participation in the discussions. In view of the Association's failure to disavow any of Neblett's statements at this meeting, and in the absence of any announced limitations on his authority, it is found that Neblett was clothed with apparent or ostensible authority to represent the Association during this meeting, and that his statements are attributable to Respondent (A. 19-20).

Bob Torres, owner of two restaurants in Santa Maria which were signed to independent agreements with the Union, attended the meeting as an observer [Tr. p. 56]. Discussion began with Lacy giving to Neblett a copy of the Union's Standard Independent Agreement [Tr. p. 58] which contained an employee retirement plans clause [Tr. pp. 77-80; Chg. Pty. Ex. 1]. Neblett inquired as to how many employers had signed the agreement and Lacy replied between 50 and 60 [Tr. p. 59]. Neblett suggested that all agreements in the area have a common expiration date and Lacy agreed [Tr. p. 60]. Discussion then passed to the subject of a Cost of Living-Index. Neblett said that he had no objection to incorporation in the Association agreement of the cost of living index contained in the independent agreement, but suggested that the necessary figures be obtained from the Bureau of Labor Statistics thirty days before the effective date of any increase so that no retroactive pay computation would be involved, to which suggestion Lacy agreed [Tr. pp. 61-62]. Lacy then brought up the subject of an employee retirement plan [Tr. p. 62]. Lacy advised that he had been instructed to do so by the membership [Tr. pp. 62-63]. The meeting lasted about one and one-half hours [Tr. p. 65] and before it ended the parties agreed to meet again on *May 26* [Tr. pp. 63-64] (A. 20).

The Employers Association's newsletter to member-employers dated *May 14, 1971* [G.C. Ex. 6] acknowledged the May 11 meeting and stated that agreement was reached on the following items: a uniform area contract; an April 1 termination date; and a cost of living index. The newsletter also stated that the Union was demanding a retirement plan, that such a plan would not benefit the majority of employees, that because most

employees do not attend Union meetings, the hands of the Union's leaders are tied by a minority, and that "is why we must unite with Mr. Lacy and resolve this issue before us in a manner that will assist the majority of our employees to meet the high cost of living they and their families are faced with today."[2] The newsletter goes on to announce: "Mr. E. J. Gund and Associates will appear before the Association meeting called for Wednesday, May 19, 1971 at the Laguna Village Inn at 2:00 P.M. The following article is an account of Mr. Gund's latest labor negotiations. It is believed this experience will be of great interest to all the industry." (A. 20-21). The Board in this regard found as follows:

> "Enclosed was a printed article containing an account of Gund's recent achievement as a management labor consultant. Headlined 'San Gabriel restaurant employees vote down union membership,' the article reported in considerable detail the results of a Board-conducted election involving eight named restaurants in the San Gabriel Valley, represented by Gund, held between March 23 and 29, after contract negotiations with Local 531, a sister local of the union, had collapsed. According to this article, with approximately 400 employees eligible to vote, the Union lost the election by a ratio of 8 to 1. It is evident from the tenor of the article that Gund was not above taking credit for the outcome, quoting Gund as saying, 'These people have been Union members for years. There has

[2]The Board, in this regard, found the following: "Whatever Mees had intended to convey, the statement in the newsletter is clear and unambiguous on its face, and justifies a finding that agreement, at least in principle, had actually been reached between the Union and the Association on these items." (A. 21).

been a labor contract in most of these restaurants for as much as twenty-three years—and after all that time the people rejected it. It's unheard of.' " (A. 20-21).

By letter dated *May 14* [G.C. Ex. 5], Mees advised Lacy that the Employers Association was terminating its agreement with the Union as of the expiration date, July 31. However, Mees also confirmed the meeting previously scheduled *May 26* (A. 20).

On *May 24, 1971,* an employer representation petition was filed by Gund, on behalf of the Association (Case No. 31-RM-252), in a unit of approximately 850 employees of members of the Employers' Association. On the morning of May 26, the date previously scheduled for the meeting between the Employers' Association and the Union, Gund notified Lacy that he was representing the Employers' Association, that he was cancelling the scheduled meeting, and had filed a representation petition with the Board (A. 21). The Petition was dismissed by the Regional Director on July 30, 1971 [Jt. Ex. 44] and such dismissal was upheld by the Board on August 19, 1971 [Jt. Ex. 46].

On *May 27, 1971,* the field examiner notified Gund by letter that the statement of objective considerations that the Association was relying on that the Union had lost its majority status had not yet been received and that the Petition could not be processed until such statement was furnished. The letter stated that unless this was received by noon, *June 2, 1971,* the field examiner would recommend that the Petition be dismissed (A. 21-22).

On *June 2, 1971,* Gund wrote the Regional Director, that due to problems of mail deliveries with his clients,

he would be unable to comply with the deadline but that the statement would be delivered by special messenger, if necessary, by Thursday, June 3, 1971 at 5 P.M. (A. 22).

At the hearing before the Administrative Law Judge, the issue squarely framed was

> "whether, on the date the ASSOCIATION withdrew recognition from the UNION, a majority of the unit employees had notified the ASSOCIATION of their disaffection with. and intention to repudiate the UNION as their bargaining agent." (A. 24).

In this connection, the Association contended that it had been advised of a sufficient number of employees' signatures from the various Association restaurants to the effect that they no longer desired representation by Petitioner Union and that such was the basis for its Petition for Election and its withdrawal of recognition from the Union (A. 25).

Charles Mees, the only employer witness called to testify in this regard stated that he first became aware of the disaffection in the latter part of May, when he observed employees circulating a petition in his restaurant. He also testified that several of his employees, who he did not identify, as well as unidentified employees of other members of the Employers' Association in unspecified numbers informed him that they no longer wished to be represented by the Union. The Board found in this regard:

> "Such evidence lacks probative value in establishing a basis for a reasonable belief that a majority of employees in the appropriate unit had decided to repudidate their bargaining representative." (A. 25).

Both Mees and the three employees circulating the petitions, to wit, Georgeann Manzer, Ed Avila and David Osterholt conceded that all of the signatures on the petition were secured in the first week of June, almost two weeks after the filing of the petition by the Employers' Association (A. 25). In this connection, employee Ed Avila testified that the petitions were actually prepared in the evening of June 1, 1971 [Tr. 11]. The three-above employees circulated the petitions day and night in the two days following on Company time and property, during working hours and with the open approval of management [Tr. pp. 172-173, 187, 174, 148, 164-165, 193, 201-202, 203-205, 209, 210, 226, 232, 233].

Avila further testified that the three employees never discussed the preparation or circulation of the Petition with Mees or any other employer until they gave Mees the petition on Thursday, June 3, 1971 and that until that date, no employer was aware of the number of employees who had signed the Petition [Tr. pp. 222-224] (A. 26). The Board found with respect to employee Ed Avila, the following:

> "Apart from Avila's description of his job as 'head bartender' there is evidence warranting a finding that he possessed other indicia of supervisory status. The subject was not fully explored, however, and the evidence is not sufficiently conclusive to justify such a finding. In any event, such a finding is not essential to the ultimate determination hereinafter made." (A. 25).

The Employers' Association contended that the entire employee complement consisted of three hundred and four (304) employees.

It is conceded that only ninety-four (94) bargaining unit employees signed the petitions upon which the Employers' Association allegedly relied in support of its "objective evidence" of majority loss. The Board found that the Employers' Association had failed to submit even thirty percent showing (A. 27).

With regard to the crash operation of the three employees securing the signatures, the Board found as follows:

> "Considering the number of restaurants the solicitors were required to visit to secure the signatures they obtained, and the short time in which this was accomplished, in an obvious 'midnight' effort to meet the deadline imposed by the Regional Director, it beggars belief that the circulation of the petitions was done without the knowledge of Mees or the Association representative, if not their actual encouragement. It is unnecessary, however, to a determination of the issues to draw such inference." (A. 26).

Respondent Board in effect characterized the Employer Association's conduct as "flagrant" and "outrageous" within the meaning of the *Tiidee Products* case. For example, the Board adopted the following findings of the Administrative Judge:

> "The uncorroborated testimony of the Association's President, that prior to its withdrawal of recognition, unnamed and unspecified numbers of employees expressed dissatisfaction with, and a desire to repudiate the Union, *was not only unconvincing and lacking in probative value, but savors of an afterthought calculated to end a colorable claim of good faith doubt of the Union's majority.*" (A. 28). (Emphasis added.)

And again:

"In view of Respondent's general opposition to a retirement plan, it is not unlikely that this may have been an attributing factor in Respondent's decision to withdraw recognition from the Union." (A. 29).

And again:

"Neblett's genuine efforts at collective bargaining, however, were shortlived, when Respondent replaced him with the firm of E. J. Gund and Associates as Labor-Relations Consultant. *As already suggested, the probable reason for the change of representatives should not be difficult to discern.*" (Emphasis added.) (A. 29).

And again:

"It is undisputed that the petitions repudiating the Union, upon which Respondent relies, were not circulated until *after* the filing of the Employer representation petition, and, indeed, not until after the Regional Director had notified Respondent of the requirement for the submission of evidence of objective considerations." (A. 25).

And again:

"What happened here is that Respondent filed its representation petition without knowing or reasonably believing that the Union had, in fact, lost its majority, and then set about obtaining evidence of objective considerations which it hoped would be sufficient to warrant an election, in the expectation that its Labor-Relations consultant would be able to duplicate his accomplishment on behalf of a similar restaurant association in ousting the Union as bargaining representative." (A. 26).

Following the filing of charges alleging violations of Sections 8(a)(1) and (5) of the National Labor Relations Act, 61 Stat. 136, 29 USC Secs. 185(a)(1) and (5) herein called "ACT", a complaint issued and hearing was held on October 19 and 20, 1971 before the Administrative Law Judge.

On January 28, 1972, said Administrative Judge entered his intermediate report and recommended a decision finding that Respondent Employers' Association had engaged in pervasive and wholesale and flagrant unfair labor practices and recommended that it be ordered to bargain collectively as required by the Act. However, said Administrative Judge declined to grant monetary relief requested on behalf of the employees involved as allowable under *IUE v. NLRB* [*Tiidee Products Inc.*], 426 F. 2d 1243. Said monetary relief, if granted, would have recompensed the employees for wages and other benefits lost by reason of Respondent Employers' Association's refusal to bargain collectively as required by the Act.

In declining the *Tiidee Products* remedy, the Administrative Law Judge stated as follows:

> "Although the *Tiidee* case appears to lend some support to the Union's view, there is, as yet, no indication that the Board has been disposed to part from its position in the *Ex-Cello* case based on the decision of the Supreme Court in H. K. Porter Co. . . . *Inasmuch as two Board members dissented from the majority opinion, it is conceivable that the Board may wish to re-examine its position with respect to this issue.* It is therefore con-

cluded that under the present state of Board law, the Trial Examiner is precluded from recommending the issuance of the requested order." (Emphasis added). Moreover, contrary to the Union's contention, it cannot be said that this case involves such a flagrant violation of the law, not to say 'massive' or 'aggravated' unfair labor practices as to warrant such a drastic remedy." (A. 17-18). (Emphasis added.)

On May 15, 1972, the Respondent Board entered its decision and order affirming the rulings of the Administrative Law Judge, adopting his findings, conclusions of law and specifically upholding the recommended order which required Respondent Employers' Association to bargain collectively with Petitioner Union on request. With respect to the objections filed by Petitioner Union to that portion of the Administrative Judge's Decision denying the request for monetary relief and the brief filed in support thereof, the Respondent Board failed to comment.

Respondent Board in this connection chose to completely ignore this important aspect of the case despite the fact that Petitioner Union in its exceptions and Brief strongly urged that the only appropriate and meaningful relief by way of compensating the employees and to prevent the wrongdoer from profiting by unlawful conduct would be the imposition of the *Tiidee Products* Remedy. Respondent Board in this connection contented itself with the terse statement:

"The Board has considered the record and the Trial Examiner's Decision in light of the excep-

> tions and briefs and has decided to affirm the Trial Examiner's rulings, findings and conclusions and to adopt his recommended order." (A. 47).

Thus from a reading of the Board's decision itself, one would never suspect that the *Tiidee Products* make-whole issue was even involved in this case.

B. The Court of Appeals' Decision.

The Court of Appeals denied the Union's Petition to Review and modify the order of the Respondent Board. The Court acknowledged that "the Board did not comment on the examiner's denial of the Union's request for monetary relief". The Court while recognizing the rule announced in *Tiidee Products* and a line of decisions by the District of Columbia Circuit, to wit, (*International Union of Electrical Workers v. NLRB* [*Tiidee Products*], 426 F. 2d 1243, cert. denied 400 U.S. 950 (1970); *UAW v. NLRB* [*Ex-Cello*], 449 F. 2d 1046, 1048-50 (D.C. Cir. 1971)) avoided the basic issue as to whether to apply that principle in the Ninth Circuit, stating:

> "In this case we need not decide whether the Board has the power to grant compensatory damages for refusal to bargain, because we agree with the finding of the trial examiner, affirmed by the Board, that the Association's misconduct was not so egregious as to justify the imposition of such an unusual remedy. The District of Columbia Circuit itself has created exceptions to its *Tiidee Products* rule in cases where the legality of an employer's refusal to bargain rested on a factually debatable question, and where the employer was not engaged in litigation to delay final resolution of the dispute."

In support of the proposition that there was involved a "factually debatable question", the court stated:

> "Here, the Board found that while the Association did not entertain a good faith doubt of the Union's majority status on the date it withdrew recognition, the Association's initial impression of widespread employee dissatisfaction was borne out when approximately 94 of the 304 employees wrote letters and signed petitions disavowing the union. Under these circumstances, the Board properly could find that the Association's refusal to bargain was not a 'clear and flagrant violation of the law' ".

The Court concluded that:

> "We reserve the question of whether the Board has the power to award such a remedy for the case in which make whole relief would be appropriate."

In its Petition for rehearing, the Union called attention again to the findings of the Board in relation to the alleged employees' showing of dissatisfaction (App. "B", pp. 3-6).

Petitioner urged to the Court in the Petition for rehearing:

> "The question of the Board's power and duty to grant monetary redress to employees effected by a 'clear and flagrant violation of the law', and in particular a refusal to bargain, is highly significant and relevant to the expectations of a great number of working people employed by business concerns covered by the Act. Whether this Court ultimately adopts a view on this important ques-

tion consistent with the District of Columbia's Circuit or decides differently, the basic question should be answered. There is no basis for reserving decision on this question in this case inasmuch as the facts found by the Board adequately show a 'clear and flagrant violation of the law.'

The Association's abrupt termination of bargaining, its filing of a Petition for Election with no reason to believe that the Union had lost the support of a majority of employees, and its subsequent frantic efforts to secure signatures in support of such petition, constitutes, we submit, an outrageous abuse of the Board's process with the objective of avoiding further collective bargaining with the Union, and in particular to avoid confrontation on the bargaining proposals that were advanced by the Union in negotiations that year. If such conduct does not constitute a clear and flagrant violation of the law, we submit that the principle enunciated by the District of Columbia Circuit is meaningless.

The Respondent Board has seen fit to ignore this important aspect of the case as though it never existed. At the least, Petitioner is entitled to a remand of this case with instructions to the Board to state reasons in support of its position, in order that a reviewing court can properly perform its functions. *Universal Camera Co. v. NLRB* (supra)."

The Court below nonetheless summarily denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT.

The Respondent Board erred in denying the *Tiidee Products* remedy without setting forth any reason in support of its decision. The Board violated in this regard the explicit provisions of the Administrative Procedure Act (APA) (60 Stat. 237; 5 USC Secs. 555 and 557). The Administrative Procedure Act provides that administrative agencies, including the NLRB, must state the reason or basis for their decision so that the parties will know why the agency acted as it did, and so the reviewing court will be able to properly perform its reviewing functions without engaging in guesswork or *post hoc* rationalization. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444; *S.E.C. v. Chenery Corp.*, 332 U.S. 194; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197; *Burlington Truck Lines v. U.S.*, 371 U.S. 167-169; *ICC v. J-T Transport Co.*, 368 U.S. 81, 93; *American Trucking Assn. v. FCC*, 377 F. 2d 121, 134 (D.C. Cir. 1967), cert. denied, 386 U.S. 943; *Austin v. Jackson*, 353 F. 2d 910, 911 (4th Cir., 1965).[3] The Board has failed to satisfy the Act's requirements.

This violation of such a plain requirement of the APA requires reversal, *Tiidee Products, supra*, 426 F. 2d at pages 1249-50, 1253; *Rayoneer, Inc. v. NLRB*,

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[3]The relevant provisions of the Act read as follows: Sec. 6(e): "Prompt notice shall be given of the denial in whole or in part of a written application, petition or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, *the notice shall be accompanied by a brief statement of the grounds for denial.*"

Sec. 8(c) ". . . All decisions are a part of the record and *shall include* a statement of—(a) findings and conclusions and the *reasons or basis therefore* on the record . . ." (emphasis added) 5 U.S.C. Secs. 555(e) and 557(c).

380 F. 2d 187 (4th Cir. 1967), or remand *NLRB v. Metropolitan Life, supra; Great Lakes Screw Corp. v. NLRB*, 409 F. 2d 375 (7th Cir. Feb. 27, 1969), 70 LRRM 2769, 2772.

In *Auto Workers v. NLRB*, 442 F.2d 1180, 79 LRRM 3005 (March 30, 1972) (CADC) the Court remanded to the Board a case where the Board had as in the instant situation simply stated that it "adopts the findings, conclusions and recommendations of the Trial Examiner only to the extent consistent herewith." The Court stated:

> "Nothing in the Labor Board's decision evidences a meaningful intention on its part to approve those portions of the Examiner's Decision . . . In light of the manner in which the Board disposed of the representation election question, when reviewing the Trial Examiner's determinations, we can only conclude that it never really considered the challenged ballot issue which was wholly irrelevant to its decision."

Recently in *NLRB v. Madison Courier, Inc.*, 472 F. 2d 1307, 80 LRRM 3377 (CADC) (Aug. 9, 1972), the Court commented on the requirement that the Board articulate the reasons for its decision as follows:

> "It is readily apparent that if reviewing courts are to be able to perform properly their statutory function under the NLRA, Labor Board decisions must be required to specifically articulate the reasons for the administrative determinations made therein. The general rule is stated in *Phelps Dodge Corp. v. NLRB*, supra:
>
> 'The administrative process will best be vindicated by clarity in its exercise. Since Congress

had defined the authority of the Board and the procedure by which it must be asserted and has charged the Federal Courts with the duty of reviewing the Board's orders (Sec. 10(e) and (f), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of this order. We do not intend to enter the province that belongs to the Board. . . . All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.

'There is a presumption that favors the Board, with its expertise, in its selection of remedies . . . *That presumption is given full effect when the Board makes a conscious selection of remedies to effectuate the Act, provided reasons for its conclusions are stated or may fairly be discerned.'" International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 138 U.S. App. D.C. 249, 256, 426 F. 2d 1243, 1250; 73 LRRM 2870, cert. denied, 400 U.S. 950, 75 LRRM 2752 (1970) (emphasis supplied). See also *Melody Music Inc. v. FCC*, 120 U.S. app. D.C. 241, 244, 345 F. 2d 730, 733 (1965).

And again:

"However, in order to prevent the total abdication of the judicial function, reviewing Courts must be careful to require that agencies decisions be sufficiently specific to permit the rational analysis of their underlying reasoning."

We submit that the power vested by the Congress in the Courts to review Board decisions, *Universal Camera Co. v. NLRB*, 340 U.S. 474, 27 LRRM 2375; 29 U.S.C.A. Section 10(e), is substantially undermined by Board decisions such as is the subject of review. High handed, arbitrary and capricious attitudes taken by the Board as to important questions of policy such as the *Tiidee Products* remedy make such review impossible. We submit that at the least this case should be remanded and the Board instructed to state reasons in support of its refusal to grant a meaningful monetary remedy so as to rectify the conduct of the Employer Association.

By Permitting the Employer Association to Reap the Benefit of Its Flagrant and Outrageous Unfair Labor Practices, the Board Has Violated Its Statutory Duty to Provide Remedies Which Effectuate the Policies of the Act.

The pattern of conduct by the Employer Association makes it clear that at all times it was engaged in a predetermined effort to avoid collective bargaining and to bring about a nonunion status on behalf of the twenty restaurants it represents. The overall pattern of the Association was manifestly clear: To resolve the strike in 1970, the Employers Association persuaded Union representatives to execute a one year contract promising that pension would be seriously negotiated in the next year. The Association's spokesman, Phillip Feick, made a good faith pledge to this effect. The Association then saw fit to change spokesmen and entered into negotiations in 1971 determined to renege on its pledge. When it became clear in the May, 1971 meeting that pension from the Union's standpoint was a serious issue in the

negotiations, the Employers apparently impressed with the success of E. J. Gund in decertifying a sister Union in the San Gabriel Valley elected to gamble on a similar result. Recognition was withdrawn and an election petition filed. When the 31st Regional Director, Abraham Siegel, advised Mr. Gund by letter dated May 31, 1971 (Jt. Ex. 6) that signatures in support of the Petition were needed quickly, activity around the clock immediately began. Three employees circulated day and night in the two days following openly soliciting signatures on Company time and property and during working hours with the open approval of management between June 1 and 3, 1971.

The Employer Association's strategy was obvious. If it was successful in the election, collective bargaining would be completely avoided. If the employees voted for Union representation, then at the least negotiations would have been forestalled for several months and the employers could successfully utilize the time delay as a means of undermining the confidence of the employees in their bargaining agent. In addition, the monies that would have been payable to the employees had good faith bargaining occurred could be used in the meantime by the Employer. The filing of the Petition therefore represented an outrageous attempt by the Employers' Association and its members to misuse the processes of the Board to further its purposes.

We submit that the Board should have ordered the following remedies against the Respondent Association:

(1) Reimbursement to the Union for reasonable litigation expenses including attorneys fees.

(2) Reimbursement to the Board for its expenses of litigation.

(3) An amount of money sufficient to compensate the employees for monetary improvements that in all likelihood would have been enjoyed if good faith bargaining had occurred.

In *International Union of Electrical, Radio and Machine Workers v. NLRB (Tiidee Products, Inc.)*, 426 F. 2d 1243, the D.C. Circuit held that the Board's use of its traditional cease and desist order "bountifully and improperly" rewarded the employer for its unfair labor practices and could not be held to comport with the Board's obligations to provide remedies which effectuate the policies of the Act. It remanded to the Board for consideration the Union's request for a remedy to compensate employees for lost bargaining rights (426 F. 2d at 1248). Such remedy, the Court said, should "relate to damages based upon a determination of what the parties themselves would have agreed to if they engaged in the kind of bargaining process required by the Act" [426 F. 2d at 1252][4]. The Court spe-

[4]See the discussion of the type of proceeding wherein such damages would be established and of the methods and sources of proof available. *Ex-Cell-O* (dissent), 185 NLRB No. 20, 74 LRRM at 1751-52. "A showing at the compliance stage by General Counsel or Charging Party by acceptable and demonstrable means that the employees could have reasonably expected to gain a certain amount of compensation by bargaining would establish a *prima facie* loss and Respondent would then be afforded an opportunity to rebut such a showing . . . Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which proves valid in each case must be determined by what is pertinent to the facts. Nevertheless the following methods for measuring such loss do appear to be available, although these are neither exhaustive or exclusive. Thus, if the particular employer and union involved have contracts cover-

cifically held that the Board had the statutory authority to issue such a remedy and indeed, to assure that its holding was clear beyond cavil it noted [426 F. 2d at 1253]:

> "We reiterate that damages can be awarded on an assessment of the contract terms that would have been complied with even though the employer violating the law had not yet entered into the contract (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398 and *NLRB v. Mooney Acft. Inc.*, 375 F. 2d 402.)."

The Court in *Tiidee Products further stated:*

> "The affirmative action clause of Section 10(c) is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as the Court has recently stated, a 'broad command' ".

And again:

> "The obligation of collective bargaining is the core of the act and the primary means fashioned

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ing other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining. The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area or industry. Or the parties might employ the national average percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics." *It is noted that the Union entered into evidence a copy of its Standard Labor Agreement executed by the majority of independent restaurant owners throughout the San Luis Obispo-Santa Maria geographical area (this contract contains provisions for wage increases, a retirement plan to be financed by employer contributions, and increased contribution to the medical insurance Trust Fund created by the contract.* It was never disputed that approximately sixty (60) independent restaurant owners were signed to this agreement [Tr. p. 80, Charging Party Ex. 1].

This contract would, we submit, be an excellent guide as to the amount of monies to be paid to the employees at the Association restaurants, as compensation for the monetary losses suffered as result of the Association's flagrant violation of the Act.

by Congress for securing industrial peace . . . Enforcement of the obligation to bargain collectively is crucial to the statutory scheme . . . Yet a prospective-only doctrine means that an employer reaps from his violation of the law an avoidance of bargaining which he considers an economic benefit. *Effective redress for a statutory wrong should both compensate the party wronged and withhold from the wrongdoer the fruits of his violation* . . . Effectuation of the Act's policies . . . requires that the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action and who may have suffered losses and consequence thereof be reimbursed for losses until such time as the Respondent remedies its violation by doing what it should have done in the first place . . .". (emphasis added).

And again:

"Employee interest in a Union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the Company is finally ordered to bargain with the union some years later, the union may find that it only represents a small fraction of the employees . . . thus the Employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy the lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively."

In *Tiidee Products*, the Court decided that monetary relief to employees subjected to flagrant unfair labor practices was necessary to "compensate the party

wronged and withhold from the wrongdoer the fruits of its violation." *Tiidee Products,* 426 F. 2d at 1243; *Montgomery Ward & Co. v. NLRB,* 339 F. 2d 889, 894 (Ca-6, 1965). The Court's decision, in addition to being in accordance with sound legal precedent[5] is clearly in accord with the Congressional intent that reviewing courts exercise more independent judgment in reviewing Board decisions. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 55, 56 (1947); S. Rep.[6] No. 105, 80th Cong. 1st Sess. 26-27 (1947). By Congressional design, courts have the power to review Board decisions to determine if the remedies provided will adequately effectuate the policies of the Act.[7] See: *Textile*

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[5]The cases cited by the Court in *Tiidee Products* establish that the Board has the authority and indeed the mandate to fashion more effective, monetary remedies. *Fibreboard Paper Products, Inc. v. NLRB,* 379 U.S. 203 (1964); *NLRB v. Mooney Acft. Inc.,* 375 F. 2d 402 (5 Cir. 1967) cert. denied, 389 U.S. 859 (1967); *NLRB v. Strong,* 393 U.S. 357 (1969); *NLRB v. Rutter-Rex Mfg. Co.,* 96 U.S. 258 (1969); *Montgomery Ward & Company v. NLRB,* 330 F. 2d 889 (6 Cir. 1965); *Winn Dixie Stores Inc.,* 147 NLRB 788, 792, aff'd in pertinent part, 361 F. 2d 512 (5 Cir. 1966); see also *Consolo v. F.M.C.,* 383 U.S. 607 (1966); *Bigelow v. RKO Radio Pictures,* 327 U.S. 251 (1946); *California Department of Human Resources v. Java,* 91 S.Ct. 1347 (1971).

[6]The amendment in 1947 of Section 10(e) of the Wagner Act by the insertion of the language "if supported by substantial [evidence] on the record considered as a whole" reflected the attitude of Congress that Courts should not automatically defer to the Board's conclusions.

[7]The Supreme Court said in *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 188 (1941): "*Attainment of a great national policy* through expert administration in collaboration with limited judicial review *must not be confined within narrow canons of equitable relief deemed* suitable by chancellors in ordinary private controversies." (emphasis added). The Board's continued adherence to the traditional cease and desist orders, a remedy proven ineffective by the very facts of this case should prompt this Court to hold that "the traditional relief provided here will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law." *Amalgamated Clothing Workers v. NLRB,* 371 F. 2d 740, 745 (D.C. Cir. 1966).

Workers Union of America v. NLRB, 420 F. 2d 635, 82 LRRM 2477 (CADC) Feb. 1, 1973).

Fairly stated, the Court in *Tiidee Products* determined that purely prospective orders to bargain in cases of "brazen refusals to bargain" do not adequately effectuate the policies of the Act.[8]

Thus the Court admonished the Board that it did not have "the option to exercise or ignore" the "affirmative action" clause of Section 10(c) and that it must order "a meaningful remedy for a manifestly unjustifiable refusal to bargain like that involved in the case at bar" [426 F. 2d at 1249 and 1250].

The Court's *Tiidee Products* decision is a significant episode in a long history of widespread criticism of the Board's failure adequately to remedy violations of the Act. As early as 1961 a Congressional subcommittee reported that a "partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board."[9] Legal scholars have joined the judiciary and the legislature in decrying the ineffectiveness of the Board orders and

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[8]Earlier, in *United Steelworkers of America (H. K. Porter) v. NLRB*, 389 F. 2d 295, 301 (D.C. Cir. 1967), rev. 397 U.S. 99 (1970), the Court took cognizance:

> "of the fact that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way."

[9]Subcommittee on NLRB of House Committee on Education and Labor, 87th Cong., 1st Sess., Report on the Administration of the LMRA by the NLRB, p. 2 (Comm. Print 1961) (Pucinski Report).

urging NLRB remedial reform. The conclusion of NLRB administrative process[10] made by Professor Ross was:

> "The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act."

See also *Bok, "The Regulation of Campaign Tactics in Representation Elections under the NLRA"*, 78 Harv. L.R. 38, 61, 124-137; O'Hara and Pollitt, *"Sec. 8(a)(3) of the Labor Act: Problems and Legislative Proposals"*, 14 Wayne L. R. 1104, 1114; St. Antoine, *"A Touchstone for Labor Board Remedies"*, 14 Wayne L.R. 1039, 1057 and; Schlossberg and Silard, *"The Need for a Compensatory Remedy in Refusal to Bargain Cases"*, 14 Wayne L.R. 1059.

Significantly NLRB members have been the foremost critics of remedial delay and ineffectiveness (former Chairman Frank McColloch[11] and Member Gerald Brown.[12] Thus, recognizing the inadequacies of the traditional remedies to expunge repeated unfair labor practices, the Board had expressed the desire to ". . . formulate remedies which will not only compensate for mistakes of the past but will also help the parties

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[10]Ross, Analysis of Administrative Process Under Taft-Hartley, 1966 Labor Relations Yearbook 299, 300.

[11]"Past, Present and Future Remedies under Section 8(a)(5) of the National Labor Relations Act", Address of Chairman Frank McCulloch at the Federal Bar Association and the George Washington University National Law Center Labor Relations Institute, Feb. 15, 1968, 67 LRRM 183, 185, BNA.

[12]"Exploring the World of Remedies", Address of NLRB Member Gerald A. Brown at the 14th Annual Institute on Labor Law of the Southwestern Legal Foundation in Dallas, Texas, Nov. 2, 1967, 1967 Labor Relations Yearbook, BNA.

to improve their relations for the future . . .".[13] And the Board had recognized that it must "constantly . . . reevaluate the remedies of the Labor Act.[14] But despite the Court's reevaluation and guidance in respect to remedies, the Board, under its present leadership, intransigently has refused to order remedies "with an eye to taking the profit out of unfair labor practices."[15]

John Fanning in the Article "*New and Novel Remedies for Unfair Labor Practices*", 3 Ga. Law Rev., page 256, 262 pointed out:

> "Success in preventing industrial strife through collective bargaining depends upon enforcement of the statutory obligation to bargain in good faith.
>
> "An Employer's unlawful refusal to bargain completely frustrates the purposes of the Act. It is a direct confrontation with the Congressional mandate to encourage collective bargaining, and is a direct denial of the statutory right of the employees to bargain collectively through their chosen representatives." (p. 263.)

By way of analogy, the Board has offered Employers guilty of bad faith bargaining to compensate the employees for their resulting financial losses. In *NLRB v. American Fire Apparatus Co.*, 380 F. 2d 1008 (CA-8) an employer who unilaterally elimi-

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[13]Address of former Chairman McCulloch, 67 LRRM 183, 186-187.

[14]"New Remedies under the National Labor Relations Act", Address of the Former Chairman Frank McCulloch at the 21st Annual Conference on Labor of the New York University Institute of Labor Relations, May 14, 1968, 68 LRRM 60, 69.

[15]*Pucinski* Report, p. 2.

nated a Christmas bonus was ordered to pay such bonus. And in *NLRB v. Hutting Sash & Door Co.*, 362 F. 2d 217 (CA-4) and *Schill Steel Products, Inc.*, 161 NLRB 939, an employer who completed the agreement and then refused to sign it was ordered to execute the agreement and make whole the employees for monetary losses suffered because of the unlawful delay.

In the Article "*A Touch Stone for Labor Board Remedies*", 14 Wayne Law Rev. pp. 1039, 1042-1043, the author points out that there are equitable reasons for imposing the *Ex-Cell-O* remedy for flagrant offenses; that the Board has in numerous instances of "massive" or "aggravated" unfair labor practices gone beyond the standard cease and desist order to provide a remedy with "considerably more bite". *J. P. Stevens & Co. v. NLRB*, 380 F. 2d 292; *NLRB v. H. W. Elson Bottling Co.*, 379 F. 2d 223. The author concludes that the *Ex-Cell-O* remedy should properly apply in the case of *all* bad faith bargaining regardless of the element of wilfulness. The author states:

> "Even the Employer who declines to bargain for the sole purpose of securing judicial review of a Board certification has deprived his employees of their statutory bargaining rights if he ultimately fails to prevail in the courts . . . *It seems entirely fair that the employer, rather than the employees, should bear the risk of his mistake.* This is no different from any other litigation in which losses may occur or accumulate because one party insists upon standing upon rights that turn out to be non-existent." (emphasis added.)

The problem of delay and its consequences occasioned by the Employer's bad faith bargaining is highlighted in the article "*An Assessment of the Proposed 'Make Whole' Remedy in Refusal to Bargain Cases*", 67 Mich. Law Rev. 374. The author there states:

> "The Union's first argument is that the NLRB order is inadequate because it does not compensate employees for the loss of economic benefits which they might have received from the employer if collective bargaining had taken place. The unions also argue that the normal cease and desist order does not require the employer to make good these losses; that many employers are actually encouraged to violate Section 8(a)(5) in order to gain time during which they do not have to incur any benefits. *In short, the argument is that an employer has much to gain by deliberately violating the NLRA since all he presently risks by such conduct is a mild reprimand in the form of a cease and desist order.*" (Emphasis added.)

The author concludes that the "make whole remedy would effectuate the purposes of the Act and have the effect of at least forcing an employer to assess more carefully his basis for refusal to bargain". In this connection, the author concludes that the preferable method of effectuating the make whole remedy is to empower the NLRB to determine the amount of loss suffered by the employees (391).

In a report submitted by the Legal Department of the *Electrical Workers Union (BNA Labor Relations Year-*

book, pp. 256, 1970) at the Union's Biannual Convention held August 24-28, 1970, it is stated:

> "For too many years, the Board has continued its policy of issuing toothless, ineffectual remedies against employers who refuse to meet their statutory obligations to bargain with a union certified by the Board as the collective bargaining agent for his employees. As a result of this policy, the Board's annual report shows a steady increase over the past 15 years in employers' refusal to bargain."
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> "That this large increase in cases reflects the ineffectiveness of Board remedies was pointed out in the report of the Subcommittee on NLRB of House Committee on Education and Labor, 87th Cong., 1st Sess., Report on Administration of LMRA by the NLRB (Comm. Print., p. 1961):
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> > 'A partial reason for the caseload and hence the delay in unfair labor practice remedies is the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a "slap on the wrist". They are too little and too late. They constitute, in the words of one witness, " a licensee fee for union busting". The sub committee recommends that the Labor Board reconsider the problem of "remedies" with an eye to taking the profit out of unfair labor practices.'
>
> "The report of the *Special Subcommittee on Labor, Committee on Labor, Committee on Education and Labor, House of Representatives,* 90th Cong. 2d Sess., similarly stated (Comm. Print. p. 2):

> 'Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force.' "

And again in commenting on the effect of the decision in *Tiidee Products*, the article states:

> "The importance of the decision in *Tiidee* to the growth of the labor movement in the United States is far reaching. *The final outcome of this case will determine whether employers can with impunity and barely for the cost of retaining expert lawyers continue to make a mockery out of Board orders directing them to bargain in good faith.*" (Emphasis added.)

But as the Court noted in *Tiidee Products* such abuse involves more than the remedial authority of the Board, it raises serious "considerations of judicial administration" (426 F. 2d at 1249-1250).[16] Analysis of the Board's Annual Reports proves the Court's point. In the past fifteen years there has been a steady increase in employer refusals to bargain. The number of Section 8(a)(5) charges doubled from 1956 to 1960, trebled by 1963, quadrupled by 1965 and quintupled by 1970.[17] More significantly, the crescendo of refusals

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[16]In an attempt to deprive wrongdoers of profit from such delay, the First Circuit recently levied a $500 fine on an employer respondent, noting that "some penalty should attach to taking up [the Court's] time with . . . a meritless contention." *NLRB v. Smith & Wesson*, 424 F. 2d 1072, 1073 (1 Cir. 1970); See also *NLRB v. United Shoe Machinery Corp.*, 445 F. 2d 633 (1 Cir. 1971) (award of counsel fees).

[17]The Board's Annual Reports show that in 1956, 838 charges alleging violations of Sec. 8(a)(5) were filed (1956 Annual Report p. 165); in 1960, 1,753 Section 8(a) (5) charges (1960 Annual Report, p. 180); in 1963, 2,584 such charges (1963 Annual Report, p. 164); in 1965, 3,815 charges (1965 Annual Report, p. 218) and in 1970, 4,489 charges (1970 Annual Report, p. 157).

to bargain has continued despite more than a fifteen-fold increase in bargaining orders from 1957 to 1967.[18] Thus its own figures prove the ineffectiveness of the Board's boilerplate bargaining order remedy.

Nor can it be gainsaid, as the Court has noted, that such Board inadequacies drain judicial resources. Again Board statistics although not broken down in subcategories of Section 8(a), show a marked increase in court review of charges against employers over the past ten years:

Year	No. of Proceedings against Employers in U.S. Courts of Appeals
1960-1961	137 (p. 228)
1961-1962	271 (p. 268)
1962-1963	198 (p. 184)
1963-1964	184 (p. 201)
1964-1965	162 (p. 212)
1965-1966	182 (p. 222)
1966-1967	197 (p. 254)
1967-1968	255 (p. 240)
1968-1969	305 (p. 236)

As the Court pointed out, in addition to clogging judicial review of all types of litigation the Board's remedial inadequacies work substantial injustices on innocent parties (426 F. 2d 1249):

> "Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the Company is finally ordered to bargain with

[18] In 1957, the Board issued 23 bargaining orders (1957 Annual Report, p. 3); in 1967 it issued 366 such orders (1967 Annual Report, p. 15).

> the union some years later, the Union may find that it represents only a small fraction of the employees. See *Ross, Analysis of Administrative Process under Taft-Hartley, 1966 Labor Relations Yearbook 299 (302-303).*"

On the basis of analysis of over 1000 refusal to bargain cases closed by the Board from 1957-1962, Professor Ross concluded that by the delays inherent in Board and court litigation employers such as the Association have been able to decimate employee bargaining rights. He stated (*op. cit.* at p. 302):

> "The longer the litigation the less likely was the prospect of the signing of a first contract. Only about half of all cases closed after a Board order resulted in such contracts and less than 36% of the cases closed after circuit court enforcement ended up with agreements."

Thus the court properly concluded that litigous employers "may reap a second benefit from [their] original refusal to comply with the law: [they] may continue to enjoy lower labor expenses after the order to bargain either because the Union is gone or because it is too weak to bargain effectively."

The Board, by failing to issue compensatory remedies against wrongdoers such as the Respondent Association who utilize every device and benefit from every delay in their design to avoid collective bargaining, encourages unfair labor practices and frustrates the key objective of the Act, to wit: to promote the practice and procedure of collective bargaining (29 U.S.C. Sec. 151). Exposure to potential compensatory remedies would inhibit the litigation of frivolous cases designed to engender delay, thus sharply curtailing the Board

and court caseload to the end of improving the administration of the Act.

Furthermore, a compensatory remedy designed to make whole employees who have lost contractual benefits as a result of the Association's "manifestly unjustifiable refusal to bargain" [426 F. 2d at 1250] would also effectuate the policies of the Act by "compensating the parties wronged" [426 F. 2d at 1249].

Very recently, the judicial concern as to the inadequacy of the conventional Board remedies was underscored in *Auto Workers v. N.L.R.B. (Gyrodyne Co.)*, 459 F. 2d 1329, 79 LRRM 2332 (CADC Jan. 25, 1972). In that case, the Court remanded to the Board with instructions to strike an employer's defense when the employer failed to obey a subpena compelling production of certain documentary evidence. The Court basing its decision on the Adverse Inference Rule took occasion to comment upon the need to prevent a guilty party from successfully gaining delay time as a result of violation of the Act.

The Court stated:

> "It is sometimes forgotten that the National Labor Relations Act deals with people's livelihoods and the stakes in an unfair labor practice hearing are consequently extremely high."

And again:

> "There is a constant danger that the aims of the Act will be frustrated by a party determined to delay the workings of justice." See Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases*, 84 Harv. L Rev. 1970, 1672-1674 (1971).

And again:

"Nowhere does the old adage about justice delayed being justice denied have more validity than in the field of labor law. As one commentator has remarked:

'Delay is especially troubling because it allows the party charged with committing an unfair labor practice to harass or injure the charging party with relative impunity by prolonging adjudication . . . the wilful violator who acts in bad faith has the power to postpone any relief for four or five years. Even then the sanction will merely be enforcement of a Board Order directing him to cease and desist from his unlawful practices. *Thus, the present system invites a rational person to improve his own position by violating the law and absorbing the half-hearted reprimand.*' (Emphasis added.)

"Note, *NLRB Power to Award Damages in Unfair Labor Practice Cases,* 84 Harv. L. Rev. at 1673."

And the Court concludes:

". . . *only after parties have learned that they have nothing to gain from defiance and delay will the Board's ultimate authority to enforce the National Labor Relations Act be vindicated.* After 35 years, there are apparently some parties who have still not learned that lesson." (Emphasis added.)

See also: *NLRB v. Ship Shape Maintenance Co.* .... F.2d ...., 81 LRRM 2865 (Dec. 1, 1972).

It is particularly clear that had the Association complied with its legal obligation in 1971, when the Union

attempted to negotiate a new Agreement, the several hundred employees working at Association houses would have enjoyed the benefits of a collective bargaining agreement up to this time. A collective bargaining contract provides employees with significant and direct monetary gains in wages and fringe benefits, as is evidenced by the Standard Independent Contract received into evidence [Chg. Party Ex. 1]. Already, therefore, to this date, the Employers Association has by reason of its outrageous conduct gained this period of financial savings and the undermining of the confidence of the employees in their bargaining agent. The traditional bargaining remedy, we submit, would be to reward the Association for such conduct and to encourage similar conduct in the future. Since the Association by its unlawful refusal to recognize and bargain with the majority representative of its employees has deprived them of financial gain over this substantial period of time, it should be required to reimburse the employees for their losses. Compensation for lost bargaining rights remedies the injury wrongfully inflicted by the employer on his employees for which, under traditional board remedies, they have no redress.

In *NLRB v. Strong*, 393 U.S. 357, 89 S.Ct. 541 (1969), the Supreme Court reiterated the principle that "making workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy[19] which the Board enforces", citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S.Ct. 845 (1941). In *Strong*, the Supreme Court

[19]In its brief to this Court in *Strong, supra*, the Board acknowledged the integral part vindication of contractual rights plays in remedies fashioned under Section 10(c) (Law Reprints, Labor Series, Vol. 2, No. 4, Bd.Br. at P. 14); see Union's brief in No. 22,318, 22,414, p. 46, n. 61.

upheld a Board order which required the Company to pay fringe benefits provided by a contract which the employer unlawfully had refused to sign. *By what rational basis can the Board justify protecting employees from loss of contractual benefits due to an employer's unlawful refusal to execute a contract and refuse to comply with the Court's mandate in the Tiidee Products case to extend the same protection to those employees whose employer illegally has refused to negotiate?*

Inasmuch as the Board will not willingly fulfill its duty under Section 10(c) to issue remedies which effectuate the policies of the Act, this Court should properly order the Board to fulfill this role by ordering the Employers Association to compensate its employees for lost bargaining rights.

We anticipate the argument that the grant of the *Tiidee Products* remedy involves speculation by the Board as to whether the Association in the exercise of good faith bargaining would have agreed to the same wages, retirement plan, etc. as contained in the Standard Independent Contract or any other monetary improvements; that short of such proof to a certainty, the Board would be in a position of writing the contract for the parties, contrary to the views expressed in *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 73 LRRM 2561. That case is not applicable, as we submit outrageous bad faith bargaining was not there present. Moreover, the D.C. Circuit by way of analogy in its decision entitled *Bangor Railroad v. Locomotive Firemen, Enginemen, etc.*, 442 F. 2d 812, 76 LRRM 2567 (Feb. 19, 1971) in imposing damages on behalf of the Union stated in a similar situation:

> "There may well be an element of uncertainty in the precise amount of damages sustained by the

Union but established principle dictates that the burden of that uncertainty must fairly rest on the wrongdoer where the wrongdoing is of such a nature as to preclude the ascertainment of the amount of damages with certainty. It would be a perversion of fundamental principles of justice to deny all relief to the injured person and thereby relieve the wrongdoer from making any amends for his acts. *In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of damages as a matter of just and reasonable inferences, although the result be only approximate. The wrongdoer is not entitled to complain they cannot be measured with the exactness and precision that would be possible if the case which he alone is responsible for making were otherwise.*" (Emphasis added.)

As the D.C. Circuit said in *Tiidee Products*, 426 F. 2d at 1251 (citing *Bigelow v. RKO, Radio Pictures*, 327 U.S. 251):

> "Where the Defendant by his own wrong has prevented a more precise computation . . . the jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly . . . any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of the victim . . . the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

See also: *Auto Workers v. NLRB* [*Ex-Cell-O*], 462 F. 2d 298, 76 LRRM 2753 (1971).

An aggravated and outrageous wrong has been committed contrary to the basic principles of the Federal Act of encouraging collective bargaining in its most meaningful sense. We submit that it is only by the imposition of the make whole remedy as described by the Court in the *Tiidee Products* and the *Ex-Cell-O* cases that the wrong committed can be effectively remedied.

Recently in *J. P. Stevens & Co. v. NLRB*, 449 F. 2d 595, 80 LRRM 2609 (CA 4) (June 6, 1972), the Court upholding the Board's power of remedy stated:

> "Remedies are peculiarly a matter of administrative competence." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194, 8 LRRM 439; *Accord, Fibreboard Corp. v. Labor Board*, 379 US 203, 216, 57 LRRM 2609.
>
> "The order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric Co. v. Board*, 319 U.S. 533, 540, 12 LRRM 739.

In *NLRB v. Madison Courier, Inc.*, 472 F. 2d 1307, 80 LRRM 3377 (*supra*) (Aug. 9, 1972) the Court further amplified the Board's broad power of remedy to effectively prevent violations of the Act. The Court stated:

> "The National Labor Relations Act confers board remedial authority on the NLRB. Section 10(c) of the Act, 29 U.S.C. 160(c) authorizes the Board, where it has determined that an unfair labor practice has been committed to require the violator 'to take such affirmative action including reinstatement of employees with or without back

pay, as will effectuate the policies of the Act. The Courts have generally given a liberal interpretation to this grant of authority.'

"It is well-recognized that the broad remedial power provided in Section 10(c) is for the labor Board to exercise, subject only to limited judicial review." See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 8 LRRM 439; *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263, 72 LRRM 2881; *NLRB v. Brown*, 380 U.S. 278, 291, 58 LRRM 2663.

"This does not mean that Courts should abdicate their judicial functions by rubber stamping NLRB decisions since the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in an unauthorized assumption by an agency of major policy decisions properly made by Congress. American Shipbuilders Co. v. Labor Board, [380 U.S. 300], at 318, 58 LRRM 672, 2679." Citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490, 27 LRRM 2373; *NLRB v. Brown & Root, Inc.*, 311 F. 2d 447, 451, 52 LRRM 2115.

And again:

"The purpose of requiring the employer to make the discriminatee whole in such a case has a two-fold objective. First, the back pay remedy reimburses the innocent employee for the actual losses which he has suffered as a direct result of the employer's improper conduct, second, *the order furthers the public interest advanced by the deterrence of such illegal acts.*" (Emphasis added.)

The Court below characterized the Association's conduct while wrongful as "not so gregious" as to justify the imposition of such an unusual remedy." The monetary award requested by the Union was not "unusual". It was a normal compensatory award similar to that which routinely is made in the case of employees who sustain financial loss by reason of discharge or other unlawful discriminatory conduct.

Moreover, the Court's summary characterization of the record before the Board was completely erroneous, based on a misapprehension of critical facts in the record and a misstatement of the Board's findings.

Conclusion.

It is clear that not only is an important question of Federal Law presented in this Petition for Certiorari, but the Court below by its misinterpretation of the evidence before the Board has in effect undermined and created a conflict with the teachings of the D.C. Circuit in *IUE v. NLRB* [*Tiidee Products*], 426 F. 2d 1243, cert. denied 400 U.S. 950; *UAW v. NLRB* [*Ex-Cello Corp*], 449 F. 2d 1046, 1048-50 (DCC Circ. 1971).

Moreover, the Court below by ignoring the argument that the Board was required to state findings and reasons in support of its decision to deny the compensatory remedy, has conflicted directly with the teachings of this court in *NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 443-444, and the D.C. Circuit in *Auto Workers v. NLRB*, ... F. 2d ....., (March 30, 1972) and *NLRB v. Madison Courier, Inc.*, 472 F. 2d 1307, CADC (Aug. 9, 1972). To follow the Board's present intransigent policy of deny-

ing a compensatory make whole remedy in the case of a clear violation of Section 8(a)(5) is to subvert the statute.

Recently in *United States v. Lanni*, 466 F.2d 1102, 80 LRRM 3462, the Court in construing Sec. 302(b) of the Act took occasion to comment on the importance of fulfillment of the real legislative purpose. In this connection, the Court stated:

> "Our purpose is to interpret a statute so that it fulfills the legislature's purpose and not to construe it . . . to subvert the legislative intent. As the Supreme Court said in *U.S. v. Shirey*, 359 U.S. 255, 260 . . .
>
> 'Statutes are not inert exercises in literary composition. They are instruments of government, and in construing them, the general purpose is more an important aid to the meaning than any rule which grammar or formal logic may lay down . . . This is so because the purpose of enactment is embedded in its words even though it is not always pendantically expressed in words . . . Statutory meaning, it is to be remembered, is more to be felt than demonstrated . . . or as Judge Learned Hand has put it, the art of interpretation is 'the art of proliferating a purpose.' . . .".

It is only by the imposition of the make whole remedy as described in accordance with the teachings of the D.C. Circuit in the *Tiidee Products* and *ExCello* cases that the wrong committed can be effectively remedied and the Act which for a period of thirty-seven years has been relied upon for guidance in labor relations by employers, employees and labor unions can be given full meaning and effect.

We submit that the facts found by the Board disclose not a "factually debatable question", but rather a "clear and flagrant violation of the law", within the meaning of *IUE v. NLRB (supra)*, 426 F. 2d at 1248. Consequently, this is a proper case to determine whether the Board in fulfillment of its legislative mandate in Section 10(c) of the Act must issue monetary compensation to injured working people in order that the polices of the Act be adequately effectuated.

This Court's decision will determine the extent to which working people injured as a consequence of clear and intentional refusals to bargain, coupled with misuse of the Board's election process, can have confidence in the Act as a means of securing a remedy which is relevant to their needs and expectations. As was appropriately observed by this Court in *Carroll v. Lanza*, 348 U.S. 408, 413:

> "We write not only for this case and this day alone, but for this type of case."

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HERBERT M. ANSELL,
Attorney for Petitioner.

ANSELL & ANSELL,
Of Counsel.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, *Petitioner*, vs. National Labor Relations Board, *Respondent*. No. 72-2155.

[November 30, 1973].

Petition to Review a Decision of the National Labor Relations Board.

Before: BARNES, TRASK, and GOODWIN, Circuit Judges. GOODWIN, Circuit Judge:

Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, petitions for review of the order of the National Labor Relations Board which denied the union's request for compensatory damages while granting other relief from an employer found guilty of an unfair labor practice.

Without deciding whether or to what extent the Board may have the power to grant compensatory damages for an employer's refusal to bargain, we find that damages would be inappropriate in this case, and deny the union's petition to remand. The Board decision is reported in *San Luis Obispo County & Northern Santa Barbara County Restaurant & Tavern Ass'n*, 196 N.L.R.B. No. 155, 80 L.R.R.M. 1584 (1972).

The union and the above-named association, a group of employers existing for the purpose, among others, of bargaining with labor organizations, have been parties to collective-bargaining agreements since at least

1965. During the 1971 contract negotiations, the employers' association hired E. J. Gund and Associates, a labor-consultation firm which enjoyed a reputation for success in bringing about nonunion conditions in establishments formerly unionized. Through the machinations of Gund and Associates, negotiations with the union were effectively brought to a standstill, and employees circulated petitions repudiating the union.

The regional director eventually dismissed the association's petition for an election, noting that the union had filed a complaint and that a notice of hearing had been issued alleging violations of §§8(a)(1) and (5) of the Labor-Management Relations Act, 29 U.S.C. §§ 158(a)(1) and (5). The trial examiner entered his intermediate report on January 28, 1972, recommending a decision finding that the association had engaged in unfair labor practices and an order requiring it to bargain collectively. The examiner refused, however, to grant the union's request for monetary relief.

The union argued that unless the unit employees are compensated for wage increases and fringe benefits which arguably they would have obtained through collective bargaining but lost through the association's refusal to bargain in good faith, no effective remedy can be had.

The Board affirmed the rulings, findings and conclusions of law of the trial examiner, and specifically adopted his recommended order requiring the association to bargain collectively with the union on request. The Board did not comment on the examiner's denial of the union's request for monetary relief. *San Luis Obispo County & Northern Santa Barbara County Restaurant & Tavern Ass'n, supra.*

In petitioning this court to review that portion of the Board's order which denied the additional relief sought by the union, the union recognizes that there is no precedent in this circuit for such supplemental relief.

The first and leading case for the proposition that the Board has the power to award compensatory damages in employer-refusal-to-bargain cases is *International Union of Elec. Workers v. NLRB* [*Tiidee Products*], 426 F.2d 1243 (D.C. Cir.), *cert. denied* 40 U.S. 950 (1970). There, the Court of Appeals for the District of Columbia Circuit found that in a case where the company's refusal to bargain was a "clear and flagrant violation of the law," 426 F.2d at 1248, the Board's use of its traditional remedy—a cease-and-desist order—did not adequately effectuate the policies of the Act since it improperly rewarded the company for its intransigence. The court remanded the case to the Board for further consideration of an award that would include meaningful make-whole relief to the union.

The rule announced in *Tiidee Products* have been followed in a growing line of decisions by the District of Columbia Circuit (see, e.g., *AUW v. NLRB* [*Ex-Cell-O Corp.*], 449 F.2d 1046, 1048-50 (D.C. Cir. 1971)), and has received a good deal of support from law review commentators. *See, e.g.*, Note, NLRB *Power to Award Damages in Unfair Labor Practice Cases*, 84 Harv. L. Rev. 1670 (1971). Nonetheless, the Board remains unconvinced that it possesses the statutory authority to grant a make-whole remedy for loss of collective-bargaining benefits. *See J. P. Stevens & Co.*, 205 N.L.R.B. No. 169, 84 L.R.R.M. 1092, 1093 (Aug. 27, 1973). Moreover, no other circuit has yet endorsed the position taken by the District of Columbia Circuit.

In this case we need not decide whether the Board has the power to grant compensatory damages for refusal to bargain, because we agree with the finding of the trial examiner, affirmed by the Board, that the association's misconduct was not so egregious as to justify the imposition of such an unusual remedy. The District of Columbia Circuit itself has created exceptions to its *Tiidee Products* rule in cases where the legality of an employer's refusal to bargain rested on a factually debatable question and where the employer was not engaged in litigation to delay final resolution of the dispute. *See, e.g., Retail Clerks Union, Local 1401 v. NLRB* [*Zinke's Foods*], 463 F.2d 316, 325 (D.C. Cir. 1972); *Southwest Regional Joint Board, Amalgamated Clothing Workers v. NLRB* [*Levi Strauss & Co.*], 441 F.2d 1027, 1035-36 (D.C. Cir. 1970); *United Steelworkers of America v. NLRB* [*Quality Rubber Mfg. Co.*], 430 F.2d 519, 520-22 (D.C. Cir. 1970).

Here, the Board found that, while the association did not entertain a good-faith doubt of the union's majority status on the date it withdrew recognition, the association's initial impression of widespread employee dissatisfaction was borne out when approximately 94 of the 304 employees wrote letters and signed petitions disavowing the union. Under these circumstances, the Board properly could find that the association's refusal to bargain was not a "clear and flagrant violation of the law." *Tiidee Products*, 426 F.2d at 1248. Moreover we note that the association

has complied voluntarily with the Board's order; the Board was not required to seek enforcement from this court.

Hence, we affirm the conclusion of the Board that the facts of this case do not call for a compensatory-damages remedy, but we reserve the question whether the Board has the power to award such a remedy for the case in which make-whole relief would be appropriate. *See Lipman Motors, Inc. v. NLRB*, 451 F.2d 823, 828-89 (2d Cir. 1971); *Herald Co. v. NLRB*, 444 F.2d 430, 436-37 (2d Cir.), *cert. denied* 404 U.S. 990 (1971).

The petition to remand is denied.

APPENDIX B.

Petition for Rehearing and/or En Banc.

United States Court of Appeals, for the Ninth Circuit.

Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, Petitioner vs. National Labor Relations Board, Respondent. Case No. 72-2155.

To: The Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

COMES NOW CULINARY ALLIANCE & BARTENDERS UNION LOCAL 703, AFL-CIO, hereinafter referred to as "PETITIONER CULINARY WORKERS UNION" and files its Petition for Rehearing and/or En Banc for review of the decision of the Ninth Circuit Court of Appeals filed November 30, 1973 in above-entitled case.

In support of this Petition, PETITIONER CULINARY WORKERS UNION respectfully shows:

I

PETITIONER UNION IS ENTITLED TO A FINDING AND REASONS IN SUPPORT THEREOF BY THE RESPONDENT BOARD WITH RESPECT TO THE PRAYER FOR MONETARY RELIEF

This Court recognized the Board's failure to state "findings and conclusions and the reasons or basis therefore on the record . . ." 5 U.S.C. Secs. 555(e) and 557(a).

In this connection, this Court stated:

> "The Board did not comment on the Examiner's denial of the Union's request for monetary relief."

This Court, however, made no further comments with respect to the right of Petitioner to a remand for this reason. At the least, Petitioner is entitled to an order remanding this case to the Board with instructions to make findings on the issue of monetary relief and reasons in support thereof. *Auto Workers v. NLRB*, 462 F. 2d 298 (March 30, 1972); *NLRB v. Madison Courier, Inc.*, 472 F. 2d 1703 (August 9. 1972); *Universal Camera Co. v. NLRB*, 340 U.S. 474.

II

THIS COURT'S CONCLUSION THAT THE EMPLOYER'S CONDUCT DID NOT CONSTITUTE A 'CLEAR AND FLAGRANT VIOLATION OF THE LAW', IS BASED ON A MISAPPREHENSION OF CRUCIAL FACTS IN THE RECORD AND A MISREPRESENTATION OF THE BOARD'S FINDINGS IN THIS REGARD

This Court while recognizing the District of Columbia Circuit's pronouncements on the issue of the Board's obligation to grant monetary relief to effected employees where the Company's refusal to bargain was a 'clear and flagrant violation of the law' *International Union of Electrical Workers v. NLRB* (*Tiidee Products*) 426 F 2d 1243; *UAW v. NLRB*, 449 F 2d 1046, has avoided a decision on this important question by concluding as follows:

> "In this case we need not decide whether the Board has the power to grant compensatory damages for refusal to bargain because we agree with the finding of the Trial Examiner, affirmed by the Board, that the Association's misconduct was not so egregious as to justify, the imposition of such an unusual remedy."

The Court supports this statement by the following characterization of evidence presented to the Board:

> "Here, the Board found that while the Association did not entertain a good faith doubt of the Union's majority status on the date it withdrew recognition, the Association's initial impression of widespread employee dissatisfaction was borne out when approximately ninety four of the three hundred and four employees wrote letters and signed petitions disavowing the Union. Under these circumstances the Board properly could find that the Association's refusal to bargain was not a 'clear and flagrant violation of the law.'"

Such construction of the Board's findings constitutes a patent misinterpretation of the evidence. The Board's actual findings with respect to the alleged employee showing of dissatisfaction were as follows:

(1) As to the testimony of Charles Mees that some employees, unidentified and in unspecified numbers, informed him of dissatisfaction with the Union, the Board found:

> "Such evidence lacks probative value in establishing a basis for a reasonable belief that a majority of employees in the appropriate unit had decided to repudiate their bargaining representative." (A 25)

And again:

> "The uncorroborated testimony of the Association's President, that prior to its withdrawal of recognition unnamed and unspecified numbers of employees expressed dissatisfaction with, and a desire to repudiate the Union, was not only unconvincing and lacking in probative value, but sa-

vors of an afterthought calculated to lend a colorable claim of good faith doubt of the Union's majority." (A 28)

(2) With respect to the undisputed fact that the signatures of employees in support of the Petition for Election were not obtained until *after* the Petition was filed, the Board found as follows:

> "It is undisputed that the petitions repudiating the Union, upon which Respondent relied, were not circulated until after the filing of the Employer representation petition, and, indeed not until after the Regional Director had notified Respondent of the requirement for the submission of evidence of objective considerations." (A 25)

(3) With regard to the crash operation of the three employees securing the signatures, on Company time and property, after the filing of the Petition, the Board found as follows:

> "Considering the number of restaurants the solicitors were required to visit to secure the signatures they obtained, and the short time in which this was accomplished, in an obvious 'midnight' effort to meet the deadline imposed by the Regional Director, it beggars belief that the circulation of the petitions was done without the knowledge of Mees or the Association representative, if not their actual encouragement. It is unnecessary, however, to a determination of the issues to draw such inference."

(4) The Board, after consideration of the entire record as it related to the activities of the Employer Association, concluded as follows:

> "What happened here is that Respondent filed its representation petition without knowing or reasonably believing that the Union had, in fact, lost its majority, and then set about obtaining evidence of objective considerations which it hoped would be sufficient to warrant an election, in the expectation that its Labor Relations consultant would be able to duplicate his accomplishment on behalf of a similar restaurant association in ousting the Union as bargaining representative." (A 26).

Consequently, the findings of the Trial Examiner, adopted by the Board, do not support the interpretation set forth in this Court's decision.

III
CONCLUSION

The question of the Board's power and duty to grant monetary redress to employees effected by a "clear and flagrant violation of the law", and in particular a refusal to bargain, is highly significant and relevant to the expectations of a great number of working people employed by business concerns covered by the Act. Whether this Court ultimately adopts a view on this important question consistent with the District of Columbia's Circuit or decides differently, the basic question should be answered. There is no basis for reserving decision on this question in this case inasmuch as the facts found by the Board adequately show a "clear and flagrant violation of the law."

The Association's abrupt termination of bargaining, its filing of a Petition for Election with no reason to

believe that the Union had lost the support of a majority of employees, and its subsequent frantic efforts to secure signatures in support of such petition, constitutes, we submit, an outrageous abuse of the Board's process with the objective of avoiding further collective bargaining with the Union, and in particular to avoid confrontation on the bargaining proposals that were advanced by the Union in negotiations that year. If such conduct does not constitute a clear and flagrant violation of the law, we submit that this principle enunciated by the District of Columbia Circuit is meaningless.

The Respondent Board has seen fit to ignore this important aspect of the case as though it never existed. At the least, Petitioner is entitled to a remand of this case with instructions to the Board to state reasons in support of its position, in order that a reviewing court can properly perform its functions. *Universal Camera Co. v. NLRB* (supra).

Undersigned counsel certifies that this Petition is not interposed for delay and that in his judgment it is well-founded.

Dated: December 13, 1973.

Respectfully submitted,

ANSELL & ANSELL
By:
Herbert M. Ansell, Esq.
Attorney for Culinary Alliance &
Bartenders Union Local 703,
AFL-CIO (Petitioner)

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Petitioner's Petition for Rehearing and/or En Banc was served upon the party shown below:

Marcel Mallet-Prevost
Asst. General Counsel
National Labor Relations Board
Washington D.C. 20570

Dated: December 13, 1973

Herbert M. Ansell
Attorney for Petitioner

APPENDIX C.

Order.

United States Court of Appeals, for the Ninth Circuit.

Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, Petitioner, v. National Labor Relations Board, Respondent. No. 72-2155.

Before: BARNES, TRASK, and GOODWIN, Circuit Judges.

Filed: Jan. 23, 1974.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.

Decision and Order.

United States of America, Before the National Labor Relations Board.

San Luis Opispo County and Northern Santa Barbara County Restaurant and Tavern Association; Anderson Hotel; Carl's Spanish Seas; Corcoran's; Airporter Inn, d/b/a Lions Inn; Best Ever Grill; Gordon's Restaurant; East Donovan House, d/b/a Rancho Bowl; The Silent Woman, Inc., d/b/a Laguna Village Inn and the Silent Woman; Fisher's Steak House; Farley's Jr.; Little Chef Restaurant; Laurel Bowl; Post Houses, Inc., d/b/a Greyhound Post House; Russell's Restaurant; Smile Inn Cafe; Rancho San Luis Coffee Shop; Sam's Restaurant; Merrell's Steak House; Bull's Tavern and Culinary Alliance & Bartenders Union, Local 703, AFL-CIO. Case 31-CA-2466.

On January 28, 1972, Trial Examiner Irving Rogosin issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and briefs and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that San Luis Obispo and Northern Santa Barbara County Restaurant and Tavern Association of San Luis Obispo and Santa Maria, California, Respondent Association herein, its officers, agents, successors, and assigns, and Anderson Hotel; Carl's Spanish Seas; Corcoran's; Airporter Inn, d/b/a Lions Inn; Best Ever Grill; Gordon's Restaurant; East Donovan House, d/b/a Rancho Bowl; The Silent Woman, Inc., d/b/a Laguna Village Inn and The Silent Woman; Fisher's Steak House; Farley's Jr.; Little Chef Restaurant; Laurel Bowl; Post Houses, Inc., d/b/a Greyhound Post House; Russell's Restaurant; Smile Inn Cafe; Rancho San Luis Coffee Shop; Sam's Restaurant; Merrell's Steak House; Bull's Tavern, of San Luis Obispo and Santa Barbara Counties, their respective officers, agents, successors, and assigns shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C. May 15, 1972.

Edward B. Miller,
Chairman

John H. Fanning,
Member

Howard Jenkins, Jr.,
Member

NATIONAL LABOR RELATIONS
BOARD

[Seal]

United States of America, Before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California.

San Luis Obispo County and Northern Santa Barbara County Restaurant and Tavern Association; Anderson Hotel; Carl's Spanish Seas; Corcoran's; Airporter Inn, d/b/a Lions Inn; Best Ever Grill; Gordon's Restaurant; East Donovan House, d/b/a Rancho Bowl; The Silent Woman, Inc., d/b/a Laguna Village Inn and The Silent Woman; Fisher's Steak House; Farley's Jr.; Little Chef Restaurant; Laurel Bowl; Post Houses, Inc., d/b/a Greyhound Post House; Russell's Restaurant; Smile Inn Cafe; Rancho San Luis Coffee Shop; Sam's Restaurant; Merrell's Steak House; Bull's Tavern; and Culinary Alliance & Bartender Union, Local 703, AFL-CIO. Case No. 31-CA-2466.

Byron B. Kohn, Esq., of Los Angeles, Calif., for the General Counsel. *E. J. Gund & Associates*, by *William E. Meyer, Esq.*, of Los Angeles, Calif., for all Respondents. *Ansell & Ansell*, by *Herbert N. Ansell, Esq.*, of Los Angeles, Calif., for the Union.

DECISION OF TRIAL EXAMINER

Statement of the Case

IRVING ROGOSIN, Trial Examiner: The complaint, issued July 30, 1971, as amended prior to the hearing, alleges that Respondents[1] have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Specifically, the complaint, as amended, alleges that, since about May 24, 1971, Respondent has refused,

[1]For convenience, unless otherwise specified, Respondents will hereinafter collectively be referred to as "Respondent."

after demand, to bargain collectively with the Union as the exclusive bargaining representative of all employees in an appropriate unit described in the complaint, by (1) withdrawing recognition from, and refusing to meet with the Union for purposes of negotiating a new contract, thereby refusing to bargain in good faith; and (2) on about September 1, 1971, unilaterally changing the health and welfare plan covering unit employees, without bargaining with the Union, thereby engaging in unfair labor practices within the meaning of Section 8(a)(5), and interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.[2]

Respondent's answer admits the procedural and jurisdictional allegations of the complaint, but denies, for lack of sufficient information or belief, or generally, the remaining allegations of the complaint.[3]

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[2]Designations herein are as follows: the General Counsel, unless otherwise noted, his representative at the hearing; San Luis Obispo County and Northern Santa Barbara County Restaurant and Tavern Association, Respondent Association, or the Association; the individual employers named in the caption of the complaint, collectively, Respondent Employers; Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, the Union, the Charging Party or Local 703; the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), the Act; the National Labor Relations Board, the Board. The charge was filed and served on June 7, 1971.

[3]In the caption of the Answer to Complaint, Respondent Association is incorrectly referred to as Petitioner, and the Charging Party, as Respondent, obviously based on the representation petition hereinafter discussed. The Answer on its face is filed on behalf of "the Respondent," but inasmuch as counsel stated on the record that he was appearing on behalf of all Respondents, the Answer has been so treated. Although no answer was filed to the Amendment to Complaint, the allegations therein are deemed to have been denied.

Hearing was held before the duly designated Trial Examiner on October 19 and 20, 1971, at Santa Maria, California. All parties appeared or were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce oral and documentary evidence relevant and material to the issues, to argue orally and file briefs and proposed findings of fact and conclusions of law. All parties availed themselves of the opportunity to argue orally and discuss the issues involved. Pursuant to an extension of time to December 8, 1971, all parties filed briefs within the time allowed.[4] No proposed findings of fact or conclusions of law have been filed by any of the parties.

Upon the entire record[5] in the case, the uncontradicted testimony or resolution of conflicting testimony and, based upon the appearance and demeanor of the witnesses, and the briefs of the parties, which have been carefully considered, the Trial Examiner makes the following:

Findings of Fact

I. The Business of Respondents

A. *Respondent Employers*

The complaint alleges, Respondent's answer admits, and it is hereby found that, at all times material here-

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[4]A letter from counsel for the Charging Party, dated January 5, 1972, supplementing the brief previously filed, by supplying a citation of a recently decided case, (*N.L.R.B. v. Warehousemen's Local 17, ILWU*, ... F.2d .... (C.A. 9), 78 LRRM 3056, see section V, The Remedy), has been duly considered.

[5]Including some 49 Joint Exhibits, introduced in the employer representation proceeding (Case No. 31-RM-252). The unopposed motion of counsel for the General Counsel, filed on November 17, 1971, to correct the transcript, in specified respects, is hereby granted and the record is hereby ordered corrected accordingly.

in, Respondent Employers, at their respective places of business, located in San Luis Obispo, and Santa Barbara Counties, California, have been engaged in the business of operating restaurants which sell food and beverages to the public. The complaint further alleges that, in the conduct of their businesses, Respondent Employers receive annually gross revenues in excess of $500,000, and purchase annually foods or beverages, valued in excess of $50,000 directly from California distributors, who received such foods or beverages directly from places outside the State of California.

B. *Respondent Association*

The complaint also alleges that, at all times material herein, Respondent Association has been an association of employers in the restaurant industry, located in San Luis Obispo, and Santa Barbara Counties, California, existing for the purpose, among others, of bargaining with labor organizations concerning wages, hours, and working conditions of employees in the employ of its members, and that, at all times material herein, Respondent Employers have been members of Respondent Association.

The complaint further alleges, Respondent's answer admits, and it is, therefore, found that, at all times material herein, Respondent Employers and Respondent Association have constituted a single employer for the purposes of the Act, and that Respondent Association and Respondent Employers, separately and collectively, constitute, and at all times material herein have constituted, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act. It is fur-

ther found that Respondent's operations satisfy the jurisdictional standards of the Board.

II. The Labor Organization Involved

Culinary Alliance & Bartenders Union, Local 703, AFL-CIO, herein called the Union or the Charging Party, is, and at all times material herein has been, a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

1. Whether the Union represented a majority of the employees in an appropriate unit, on about May 1, 1971, when the Union requested Respondent to meet and bargain collectively with respect to a new contract.

2. Whether Respondent entertained a good faith doubt of the Union's majority, based upon objective considerations, since about May 24, 1971, justifying its refusal to bargain with the Union.

3. Whether, by withdrawing recognition from the Union, on about May 24, 1971, and refusing to meet for the purposes of collective bargaining with regard to a new contract, Respondent has failed and refused to bargain in good faith, within the meaning of Section 8(a)(5) of the Act.

4. Whether, by unilaterally changing the health and welfare plan covering unit employees, on about September 1, 1971, without negotiating with the Union, Respondent has failed and refused to bargain in good faith, within the meaning of Section 8(a)(5) of the Act.

B. *Background*

On August 23, 1965, the Association and the Union renewed a collective-bargaining agreement, designated as "Agreement & Declaration of Trust," effective from November 1, 1961 to October 31, 1963, automatically renewable annually thereafter in the absence of specified notice. By the terms of the agreement, the Association, denominated as the "Employer," recognized the Union as exclusive bargaining agent for all employees of Association members in classifications set forth in a schedule attached to the agreement, establishing wage scales, and health and welfare contributions, effective from August 1, 1965, through July 31, 1967. The basic industry agreement provided for union security, and contributions in stated amounts to the Central Coast Hotel-Restaurant-Tavern Employees Welfare fund plan, dated November 1, 1957, amended by succeeding collective-bargaining agreements.

By letter, dated March 12, 1968, the agreement was further amended with regard to wage scales and health and welfare contributions, effective from August 1, 1967 to July 31, 1970, inclusive.

During the 1970 contract negotiations between the parties, the Union proposed that the Association establish a pension plan for employees. A strike ensued, which was settled by the execution, on August 15, 1970, of a 1-year contract, expiring on July 31, 1971. The Union abandoned its demand for a pension plan on the alleged understanding with Philip J. Feick, the then employer representative, that the parties would give consideration to such a plan in negotiations for the next contract. In January or February 1971, during contract negotiations, the parties discussed the subject of a retirement plan, but nothing materialized.

Late in April or early May 1971, Union Business Manager and Secretary-Treasurer William H. Lacy met with Association President Charles J. Mees, in the latter's restaurant, Farley's Jr. (one of the individual Respondent Employers). Lacy proposed that the parties commence negotiations early to avoid a previous experience when the parties were "caught short," necessitating extension of negotiations beyond the August 1 deadline. Mees agreed, and the parties met on May 11, at the Laguna Village Inn (another of the individual Respondent Employers) in San Luis Obispo.

The Union was represented by Lacy, Executive Board Member Harold Livesey, and San Gin, acting as negotiating committee; the Association, by some five restaurant owners, members of the Association.[6] Commissioner Louis Gilbert, of the State Mediation and Conciliation Service, was also in attendance. Also present at this meeting was Thomas Fair Neblett, a labor relations consultant, whom Mees introduced, and who acted as spokesman for the Association.[7]

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[6]In addition to Mees, the other representatives were John Noggle, Little Chef Restaurant; Bob Fisher, Fisher's Steak House; Carl Smith, Carl's Spanish Seas; Carl Mathis, and his daughter, Betty Grau, The Silent Woman, Inc., d/b/a Laguna Village Inn and The Silent Woman, all restaurants named as Respondent Employers herein. Robert Torres, owner of two restaurants in Santa Maria, both known as Pappy's Pancake House, an independent restaurateur, who had already signed an individual contract with the Union, was present as an observer.

[7]At the hearing, Mees disclaimed Neblett's authority to act as spokesman for the Association and its members, testifying that Neblett ". . . just came up, and he wanted to appear there and talk to all the members, and see if we thought he was competent," intimating that Neblett was merely being auditioned for the role of labor relations consultant. Neither Mees nor any of the other Association representatives, however, apprised the union representatives to this effect, nor did they voice any objection or opposition to Neblett's statements or participation in the discussions. In view of the Association's failure to disavow any

At the outset of the meeting, Lacy furnished Neblett with a copy of the Union's standard form of agreement for independent restaurants, which contained a pension plan provision. Responding to Neblett's inquiry, Lacy informed him that between 50 and 60 independent employers had signed such an agreement. Neblett indicated that he would like an opportunity to verify Lacy's statement, and Lacy agreed to produce the contracts for Neblett's perusal whenever he wished. The matter was not pursued. Neblett turned to the subject of the cost-of-living formula, and stated that he had no objection to incorporating in the Association agreement the cost-of-living formula provided for in the independent agreement, but suggested that the pertinent figures be obtained from the Bureau of Labor Statistics 30 days before the effective date of any increase, to obviate any necessity for computing retroactive pay. Lacy agreed. Neblett also proposed a uniform contract, applicable to both Association members and non-member employers, with a common expiration date. Again, Lacy agreed.

Mees then raised the question whether the employees would not prefer to have some other benefit, in lieu of a pension plan. Lacy stated that he had been instructed by the union membership to negotiate a retirement plan and that he could not disregard his instructions without further authorization. The meeting adjourned after about an hour and a half, with an-

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of Neblett's statements at this meeting, and in the absence of any announced limitation on his authority, it is found that Neblett was cloth.d with apparent or ostensible authority to represent the Association during this meeting, and that his statements are attributable to Respondent. Section 2(13) of the Act. See *Sierra Academy of Aeronautics, Inc., et al.*, 182 NLRB No. 82; *Aptos Seascape, Inc.*, 194 NLRB No. 94.

other meeting scheduled for Wednesday, May 26, at Merrell's Steak House, in Santa Maria.

On May 14, 1971, the Association wrote Lacy that it was terminating the collective-bargaining agreement, as well as individual contracts of Association members, on July 31, 1971. The letter confirmed, however, the meeting scheduled for May 26, for the purpose of continuing negotiations for a new contract. Copies of this letter were forwarded to the Regional Office of the Federal Mediation and Conciliation Service, and to the California State Conciliation Service, both in Los Angeles.

In a newsletter to Association members, dated May 14, 1971, accompanied by a copy of the letter of termination of the Association contract, dated the same day, the Association reported on the negotiating meeting held May 11, 1971. The letter announced that "[a]n agreement was reached on the following: (1) A uniform contract should prevail throughout the area; (2) Termination date will be April the 1st; (3) A cost-of-living each year in all categories."[8]

The newsletter pointed up the difficulties in resolving the retirement plan issue, and, while stressing certain negative aspects of the plan, urged members to

[8]At the hearing, Mees denied that any actual agreement had been reached with the Union, testifying at one stage that he had used the word "agreement" in the newsletter "[m]ore or less as a figure of speech." Elsewhere, Mees testified that he intended merely to report that agreement had been reached on the three items listed only among various employer-members of the Association. At another stage of his testimony, Mees testified that there had been a "meeting of the minds" between the Union and the Association on the three items. Whatever Mees may have intended to convey, the statement in the newsletter is clear and unambiguous on its face, and justifies a finding that agreement, at least, in principle, had actually been reached between the Union and the Association on these items.

consider the welfare of employees in regard to this issue. The letter continued, "This is why we must unite with Mr. Lacy and resolve this issue before us in a manner that will assist the majority of our employees to meet the high cost of living they and their families are faced with today."

Finally, the letter concluded with an announcement that "Mr. E. J. Gund and Associates" would appear at an association meeting on Wednesday, May 19, 1971, at the Laguna Village Inn, at 2 p.m. Enclosed was a printed article, containing an account of Gund's recent achievement as a management labor consultant. Headlined, "San Gabriel restaurant employees vote down union membership," the article reported in considerable detail the results of a Board-conducted election, involving eight named restaurants in the San Gabriel Valley, represented by Gund, held between March 23 and 29, after contract negotiations with Local 531, a sister local of the Union, had collapsed. According to this article, with approximately 400 employees eligible to vote, the Union lost the election by a ratio of 8 to 1. It is evident from the tenor of the article that Gund was not above taking credit for the outcome, quoting Gund as saying, "These people have been Union members for years. There has been a labor contract in most of these restaurants for as much as twenty-three years—and after all that time the people rejected it. It's unheard of."

On May 24, 1971, an employer representation petition was filed by Gund, on behalf of the Association (Case No. 31-RM-252), in a unit of approximately 850 employees of members of the Association.[9] On

[9]An appendix to the petition lists some 34 restaurants in San Luis Obispo and Santa Barbara, including the 21 employers named in the complaint.

the morning of May 26, the date previously scheduled for the meeting between the Association and the Union, Gund notified Lacy that he was representing the Association, that he was cancelling the scheduled meeting, and had filed a representation petition with the Board.

Meanwhile, the same day the petition was filed, the Regional Director, in a form letter, acknowledging the filing of the petition, and furnishing the name of the Field Examiner to whom the case had been assigned, requested Gund to submit, as part of the routine information required to process the petition, a statement of the "objective considerations" upon which he based his belief that the Union had lost its majority status.

On May 27, the Field Examiner notified Gund by letter that the statement of objective considerations had not yet been received, and that the petition could not be processed until such statement was furnished. The letter stated that, unless this was received by noon, June 2, 1971, the Field Examiner would recommend that the petition be dismissed.

On June 2, 1971, Gund wrote the Regional Director that, due to problems of mail deliveries with his clients, he would be unable to comply with the deadline, but that the statement would be delivered by special messenger, if necessary, by Thursday, June 3, 1971, at 5 p.m.

On June 3, the Regional Director acknowledged Gund's letter, confirming the substance of a telephone conversation with Gund earlier that day. The letter informed Gund that the statement of objective considerations would be considered timely filed only "if

the date of receipt is still within the time period when its valid petition could have been filed." The letter continued, "It is possible that the date when a petition could timely be filed has already passed. If that turns out to be the case, your petition will be dismissed, unless withdrawn. I am not able to make a determination at this time as to the last date when a petition could timely be filed because you have not yet submitted a copy of the current collective-bargaining agreement as was requested in my letter of May 24, 1971." After referring to Section 101.17 of the Statements of Procedures of the National Labor Relations Board, the letter went on, "You will note that you already have been afforded much more time than 48 hours after filing, as is provided in that section. I deem that any extension of time would be unreasonable if it extends beyond the last day when the petition properly could have been filed."

Later that day, by letter delivered by messenger, Gund submitted to the Regional Director several handwritten letters,[10] as well as petitions, which had been "voluntarily circulated by certain employees in the San Luis Obispo and Santa Maria area," advising their employers, members of the Association, of their dissatisfaction with membership in the Union. These petitions, the letter stated, were being submitted as "objective evidence" of the Association's good faith doubt of "the desire of these employees to remain members in good standing in the Union," and in support of the petition for an election.

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[10]Of the handwritten letters, expressing disaffection with the Union, involving a total of some 19 purported employees, those bearing dates, ranged from May 29 to June 1, 1971. Two others, dated June 2 and 17, respectively, were submitted by Gund on June 21, 1971.

On July 30, 1971, the Regional Director notified Gund that, inasmuch as a complaint and notice of hearing had been issued in the present case, alleging violations of Sections 8(a)(1) and (5) of the Act, he was dismissing the petition. Under date of August 6, 1971, the Association's labor relations consultant filed a request for review of the dismissal of the petition.

On August 19, 1971, the Board sustained the Regional Director's dismissal of the petition.

There have been no further meetings between the Association and the Union since May 11, except for a meeting on August 12 between union counsel and the Association's representative. At that meeting, union counsel submitted a complete contract proposal. Gund asserted his doubt of the Union's majority status, and, after announcing that the Association intended to institute its own health and welfare plan, effective September 1, stated that he would "bargain" solely on the subject of health and welfare.[11] Effective September 1, the Association instituted a group health and welfare plan providing for $1,000 life insurance, hospital

[11]An exchange of letters between union counsel and the Association labor consultant, between August 24 and August 26, 1971, confirms the substance of the matters discussed at that meeting, though with differing degrees of emphasis. In Gund's letter, he indicated that he had stated that it would be unlawful for the Association to bargain with the Union because it entertained a good faith doubt of the Union's majority, asserting that the Association had more than 200 statements from employees that they no longer desired to have the Union represent them. Gund also confirmed that he had stated that he would bargain about health and welfare because, as of August 31, 1971, the employees would no longer be covered under the Union's health and welfare plan. He conceded that he had further stated that the Association wished to institute its own health and welfare plan because it felt it could obtain the same coverage at lower cost, considering the excessive administrative fee under the union plan.

and major medical coverage, and hospital insurance for dependents only, as outlined in a group insurance brochure of the Union Mutual Life Insurance Company. According to the communication from the insurance broker to the Association, on August 25, 1971, accompanying the brochure, the plan provided for the following additional benefits not included in the union plan:

1. All employees would be eligible to apply for group discount auto rates on an individual basis through Coast Counties Insurance.
2. All employees would be eligible to apply for group discount rates on homeowners coverage.

C. *The Refusal to Bargain*

1. The appropriate unit

The complaint alleges, Respondent's answer admits, by its failure to deny, and it is hereby found that:

> All kitchen, dining room, bar and fountain employees employed by Respondent Employers at their restaurants located in San Luis Obispo County, California and Santa Barbara County, California, excluding office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. The Union's majority status

The Union's majority status is initially established by the successive collective-bargaining agreements between the parties, the most recent of which was effective from August 15, 1970 to July 31, 1971. It is well settled that, even in the absence of a Board certi-

fication, there is a presumption that a contracting union continues as majority representative of unit employees. While this presumption is rebuttable, clear and convincing proof is required to establish that the union has ceased to be the bargaining agent.[12] The issue of objective considerations, sufficient to support a claim of good faith doubt of the Union's majority, will be considered separately.

3. The demand for negotiations

In view of the evidence regarding Business Manager Lacy's meeting with Association President Mees, late in April or early in May, which resulted in the bargaining meeting on May 11, and the discussions regarding, if not agreement on, three specific issues, there can be no dispute regarding the Union's bargaining demand.

4. Objective considerations

The record conclusively establishes the Association's withdrawal of recognition and refusal to bargain in the telephone conversation between Gund and Lacy, on May 26, cancelling the previously scheduled meeting that day, as well as by the filing of the employer petition on May 24. This leaves for consideration the issue of whether, on the date the Association withdrew recognition from the Union, a majority of the unit employees had notified the Association of their disaf-

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[12]See *Ref-Chem Co.*, 169 NLRB 377, 381; *C & P Plaza Department Store*, 163 NLRB 686, 688-9. See also *Manor Research Inc.*, 165 NLRB 909; *Master Touch Dental Laboratories*, 165 NLRB 585. See also *West Suburban Transit Lines. Inc.*, 158 NLRB 794, 798.

fection with, and intention to repudiate the Union as their bargaining agent. Stated otherwise, it becomes the duty of Respondent to demonstrate by objective considerations that at the time it withdrew recognition it had reasonable grounds to believe that the Union had lost is majority status.[13]

Apart from the petitions, presently discussed, the only evidence of alleged employee disaffection with the Union, was furnished by Association President Mees. According to him, he first became aware of this disaffection in the latter part of May, after the May 11 negotiating meeting, when he observed employees circulating a petition in his restaurant. He testified, in general terms, that several of his employees, whom he did not identify, as well as unidentified employees of other members of the Association, in unspecified numbers, informed him that they no longer wished to be represented by the Union. Such evidence lacks probative value in establishing a basis for a reasonable belief that a majority of employees in the appropriate unit had decided to repudiate their bargaining representative.

It is undisputed that the petitions repudiating the Union, upon which Respondent relies, were not circulated until after the filing of the employer representation petition and, indeed, not until after the Regional Director had notified Respondent of the require-

[13]See *Barrington Plaza and Tragniew, Inc.*, 185 NLRB No. 132, citing *United States Gypsum Company*, 157 NLRB 652, 656.

ment for the submission of evidence of objective considerations.

The petitions were actually circulated by three employees: Georgeann Manzer, employed at The Silent Woman, Edward I. Avila, head bartender at Laurel Bowl, Inc., and David R. Osterholt, employed at the Rancho Bowl.[14]

These employees discussed among themselves the circulation of a petition some 4 or 5 days after first observing the NLRB notice of the filing of the representation petition posted at the premises of their respective employers. Osterholt, however, testified that he and Avila had been discussing their discontentment with the Union for some time, though he testified that the decision to circulate a petition for withdrawal from the Union was "triggered" by the notice of the filing of the representation petition. Avila and Osterholt, with an employee named Dennis Taylor, composed the petition, and Avila prepared it in typewritten form some 10 days after first observing the notice of the representation petition. According to Manzer, she circulated the petition late in May or early in June. Avila, however, was able to fix the date definitely, after reference to the calendar, as June 1, the same night the petition was prepared.

These three employees, together with Taylor, began circulating the petition that night, continuing through the night of Thursday, June 3, visiting restaurants of Association members, as well as non-member em-

[14]Apart from Avila's description of his job as "head bartender," there is evidence warranting a finding that he possessed other indicia of supervisory status. The subject was not fully explored, however, and the evidence is not sufficiently conclusive to justify such a finding. In any event, such a finding is not essential to the ultimate determination hereinafter made.

ployers, either separately or in the company of one of the others, and solicited employees to sign. The solicitation took place at the various restaurants during regular business hours, while restaurant employees were performing their usual duties, though not during rush hours, after first obtaining permission from the owner or manager of the restaurant. In Manzer's case, the solicitation occurred, and signatures were obtained, at the cash register. She spent about a day-and-a-half, between 9 p.m. one day, and 3 a.m. of the day after, circulating one of the petitions at restaurants in San Luis Obispo and Santa Maria. According to her, she solicited some 40 employees personally, each of whom signed a petition in the presence of one or more of the solicitors. In addition, according to Manzer, some 70 employees signed the petition outside her presence. Of a total of 126 signatures, on five petitions, Manzer testified, 35 percent, or between 42 and 45 employees signed the petition in her presence. Osterholt testified that between 30 and 45 employees signed the petition in his presence.

Manzer turned over the signed petitions to Avila and Taylor, and Osterholt turned his over to Avila. According to Avila, none of the employees who engaged in the preparation or circulation of the petition discussed it with Mees or any other employer until Thursday, June 3, when they turned the petition over to him. Until then, Avila testified, no employer had been aware of the number of employees who had signed a copy of the petition.[15]

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[15]Considering the number of restaurants the solicitors were required to visit to secure the signatures they obtained, and the short time in which this was accomplished, in an obvious "midnight" effort to meet the deadline imposed by the Regional Director, it

(This footnote is continued on next page)

The record clearly establishes that, apart from Mees' vague and nebulous testimony, that an unspecified number of unnamed employees expressed their disaffection with the Union to him, Respondent had no reasonable basis for doubting the Union's majority status. The representation petition was filed May 24 and, on May 26, Respondent cancelled the bargaining meeting with the Union scheduled for that day. It was not until the night of June 1, that the withdrawal petitions were prepared and circulation was begun. Thus, there is a complete absence of any evidence, apart from Mees' hearsay and uncorroborated testimony, that Respondent had any reasonable basis for a good faith doubt of the Union's majority status on May 24 or 26. What happened here is that Respondent filed its representation petition without knowing or reasonably believing that the Union had, in fact, lost its majority, and then set about obtaining evidence of objective considerations which it hoped would be sufficient to warrant an election, in the expectation that its labor relations consultant would be able to duplicate his accomplishment on behalf of a similar restaurant association in ousting the union as bargaining representative.

Good faith doubt of a Union's majority status, as the General Counsel points out, cannot be based on an employer's subjective state of mind but must be grounded on objective considerations. *The Little Rock Downtowner, Inc.*, 168 NLRB 107. The presumption of the Union's continuing majority status, resulting from the Union's contractual relations with the employer,

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beggars belief that the circulation of the petitions was done without the knowledge of Mees or the Association representative, if not their actual encouragement. It is unnecessary, however, to a determination of the issues to draw such inference.

must be rebutted by "clear and convincing proof." *Ref-Chem Co.*, 169 NLRB No. 45. The mere filing of a representation petition does not establish an employer's good faith doubt of the Union's majority status. *East Bay Rambler, Inc.*, 168 NLRB 1000, 1009-1010.

The General Counsel does not rest, however, on these principles, alone, but maintains that the so-called objective considerations submitted with the employer representation petition do not establish that Respondent had a reasonable basis for believing that the Union had lost its majority or that the Union had, in fact, lost its majority status.

The General Counsel has made a detailed analysis, annexed to his brief, of the employee petitions which, he contends, demonstrates that the objective evidence relied on by Respondent does not establish by clear and convincing proof that the Union had, in fact, lost its majority status. *Ref-Chem Co., supra.*

The record establishes that, at all times material, the employee complement of members of the Association comprised 304 employees.[16] The employee petitions contain a total of 174 individual signatures of all purported employees, nine of whom signed more than one petition or letter of repudiation. Further analysis of the petitions, and the several letters of repudiation of the Union, reveal that some 94 purportedly unit

[16]Respondent stipulated at the hearing that the employee complement consisted of those employees named on he several lists submitted by the Employers in the representation case. According to those lists, the employee complement consisted of 304 employees. In the representation petition, Respondent alleged an employee complement of 850 employees. In the request for review of dismissal of the representation petition, Respondent claimed that the employee complement consisted of some 500 employees. At the outset of the present hearing, Respondent claimed that the employee complement amount to about 400 employees.

employees, including three or four whose signatures are illegible, signed such documents. It would thus appear that, assuming the genuiness of the signatures, less than one-third, certainly less than a majority of the employees in the bargaining unit had indicated their desire to withdraw from the Union.[17]

Furthermore, it is obvious from their testimony that the employees who circulated the petition were not even aware which employers were members of the Association, and that they circulated the petitions at restaurants without regard to such consideration. Manzer testified that she circulated the petition among employees of such non-member employers as the Motel Inn, Gigi's, Rick's Rancho, and Hunter's Inn. According to Avila, he circulated the petition at the Motel Inn, the Madonna Inn, Hunter's Inn, The Vandenberg Inn, Gigi's, Rick's Rancho, The Beacon Outpost and the Galley. Osterholt testified that he circulated the petition at the Vandenberg Inn and Gigi's. Thus, it is evident that the solicitors obtained signatures of employees of non-members of the Association. Admittedly, Respondent made no effort to ascertain whether the signatures on the petitions were of employees in the bargaining unit. Moreover, presumably Respondent did not count the signatures on the petitions but, instead, represented, in their request for review of the dismissal of the petition, and at the present hearing, that the petitions contained, at least, 200 signatures of unit employees.

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[17]Although there appears to be no authority in point, that, assuming as in the case of an RC petition, a showing of 30 percent would be required to support an RM petition, it is evident that Respondent has failed to make such a showing. While this may not be conclusive, on the issue of Respondent's good faith doubt of the Union's majority, it is indicative of the absence of such a good faith doubt.

It may be noted that the employer representation petition contains the names of 34 individual restaurants. Respondent's answer admits the allegation in the complaint, that the employees of 19 restaurants constitute an appropriate bargaining unit, the description of which is not contested. The record supports a finding that Respondent precipitately withdrew recognition from the Union, without any reasonable basis for entertaining a good faith doubt that the Union no longer represented a majority of the unit employees.

This is not to say that, where the union has presumptive majority status by reason of successive collective-bargaining agreements, before an employer may claim a good faith doubt of the union's majority, he must make a determination with arithmetical preciseness that the union has lost its majority or continues to represent only a minority of the employees. Here, however, Respondent at no time raised the issue of majority until after it had met in a bargaining session with the Union, and had retained a labor relations consultant, when for the first time, it raised the question. The uncorroborated testimony of the Association's president, that prior to its withdrawal of recognition, unnamed and unspecified numbers of employees expressed dissatisfaction with, and a desire to repudiate the Union, was not only unconvincing and lacking in probative value, but savors of an afterthought calculated to lend a colorable claim of good faith doubt of the Union's majority.

It may be taken as datum that, even if an employer's doubt of union majority status is based upon objective considerations, such a claim must be advanced in good faith and not for the purpose of gaining time in

which to undermine the Union.[18] It should be observed, here, that Respondent did not file the representation petition until nearly 2 weeks after negotiations between the parties had begun, and tentative agreement reached on certain items. Respondent did not, at that meeting or at any time thereafter, until it had retained its new labor relations consultant, question the Union's majority. In fact, the parties had scheduled another bargaining meeting for May 26, but, instead, had its representative file the RM petition and cancel the meeting previously scheduled, raising for the first time any issue of union majority. In light of the parties' past bargaining history, an inference is warranted that, in withdrawing recognition from the Union and refusing to bargain with it, Respondent was motivated not by a sincere good faith doubt of the Union's majority, but by a purpose to divest the Union of its status as exclusive representative of the unit employees.[19]

It will be recalled that one of the Union's principal demands at the bargaining meeting was for a pension or employee retirement plan. Such a demand had been made in the negotiations for the 1970 agreement, and been abandoned that year, on the understanding that it would be reconsidered in the following year's negotiations. In view of Respondent's general opposition to a retirement plan, it is not unlikely that this may have been a contributing factor in Respondent's decision to withdraw recognition from the Union.

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[18]Terrell Machine Co., 173 NLRB 1480, 1482; see also *C & C Plywood Corporation*, 163 NLRB No. 136.

[19]*Petropoulos Brothers Appliances*, 169 NLRB 1161; see also *Bally Case and Cooler, Inc.*, 172 NLRB No. 106; *J. C. Penney Company (Store No. 134)*, 162 NLRB 1553.

At the bargaining session on May 11, discussions conducted by Neblett, the Association's spokesman at the meeting, indicated that substantial progress was being made in an attempt to reach a collective-bargaining agreement which would be acceptable to both sides. Neblett's genuine efforts at collective bargaining, however, were short-lived, when Respondent replaced him with the firm of E. J. Gund and Associates as labor relations consultant. As already suggested, the probable reason for the change of representatives should not be difficult to discern.

For all the foregoing reasons, including the absence of adequate objective considerations, it is found that Respondent did not, on or about May 24, 1971, entertain a good faith doubt of the Union's majority status, and that, in any event, its withdrawal of recognition, and refusal to bargain with the Union, were not made in good faith, but for the purpose of gaining time in which to undermine the Union.

The complaint alleges, by amendment, that Respondent has also violated the Act, by unilaterally changing the health and welfare plan, covering bargaining unit employees, without engaging in collective bargaining with the Union. It is Respondent's position that, having entertained a good faith doubt of the Union's majority, it was not required to notify or bargain with the Union with respect to any change in the health and welfare plan.

It will be recalled that, at the August 12 meeting between the Union attorney and Respondent's representative, when presented with a complete contract proposal, Gund asserted his doubt of the Union's majority, announced that Respondent would put into effect its own helath and welfare plan on September 1,

and stated that it would bargain only with respect to the subject of health and welfare. Having found that Respondent unlawfully withdrew recognition from the Union, on or about May 24, and that the Union retained its status as majority representative, it is evident that Respondent Association could not limit its offer to bargain with the Union solely to the subject of health and welfare. It has been held that an employer's refusal to discuss certain mandatory subjects of collective bargaining until other questions have been resolved, constitutes evidence of bad faith.[20]

Since it has been found that the Union was, at all times material herein, the exclusive representative of the employees in an appropriate bargaining unit, Respondent was obligated to bargain with it in good faith on all mandatory subjects of collective bargaining, including health and welfare. *N.L.R.B. v. Katz,* 369 U.S. 736. By insisting on confining negotiations to the subject of health and welfare, and refusing to discuss other mandatory subjects of collective bargaining, Respondent precluded the possibility of meaningful negotiations, and failed to fulfill its bargaining obligation.

Furthermore, comparison of the health and welfare plan, under the previous collective-bargaining agreement, with the plan eventually adopted unilaterally by Respondent, indicates that Respondent granted the employees greater benefits in at least two respects. Moreover, under Respondent's plan, eligibility for benefits

[20]See *Cabinet Manufacturing Corp.,* 140 NLRB 576, 578. Piecemeal bargaining, where either party adamantly insists upon dealing with each mandatory subject of collective bargaining in isolation, does not constitute good faith bargaining. Meaningful bargaining, as the General Counsel points out, can only take place when each party is prepared to make compromises in the give-and-take of collective bargaining.

has been accelerated as compared with the plan under the last collective-bargaining agreement. Such grant of additional benefits can only be viewed as an attempt to derogate the Union's role as exclusive representative of the employees.

It is, therefore, found, upon the basis of the foregoing, and upon the entire record, that, by withdrawing recognition from, and refusing to recognize and bargain with the Union, on and after May 24, 1971, allegedly on the ground that Respondent entertained a good faith doubt of the Union's majority status on that date, particularly after meeting, negotiating, and arriving at a tentative agreement with the Union on some issues; and, by unilaterally establishing its own health and welfare plan, without affording the Union an opportunity to bargain thereon, and by granting the employees additional benefits, Respondent has failed and refused to bargain with the Union, on and after May 24, 1971, thereby engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act, and interfering with, restraining and coercing employees in the exercise of rights guaranteed in Section 7, in violation of Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondents, set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5), by the conduct previously detailed, it will be recommended that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondents have unlawfully withdrawn recognition from the Union, have failed and refused, after the Union's demand, to recognize and bargain collectively with the Union as the exclusive representative of the employees in an appropriate unit, and have unilaterally granted the employees benefits in order to undermine the Union's status as exclusive representative. It will, therefore, be recommended that Respondents be required to recognize and bargain in good faith with said Union as the exclusive representative of its employees.

The Union contends that the customary remedial order is wholly inadequate to redress Respondents' unfair labor practices, and has urged, in effect, that they be required to compensate the unit employees for wage increases and fringe benefits, which arguably they would have obtained through collective bargaining, but for Respondents' unlawful refusal to bargain in good faith. The Union submits that these wage increases and fringe benefits can be accurately measured in terms of the standard collective-bargaining agreements, providing for specified wage increases, and contributions to the retirement plan, already signed by some 60 independent restaurant owners in the same geographical area, as a result of the most recent negotiations. (It may be noted, in passing, that the retire-

ment plan under these contracts had not yet been implemented by the independent restaurant owners and the Union at the time of the hearing.)

The Union has cited impressive authority for this proposition, in the way of Law Review articles, notably one by Board Member Fanning, espousing a more effective remedy than the one usually provided in such cases. Although the *Tiidee* case[21] appears to lend some support for the Union's view, there is, as yet, no indication that the Board has been disposed to depart from its position in the *Ex-Cell-O* case,[22] based on the decision of the Supreme Court in *H. K. Porter Co.*,[23] the majority of the Board concluding that it lacked statutory authority to issue such a remedy. Inasmuch as two Board members dissented from the majority opinion, it is conceivable that the Board may wish to reexamine its position with respect to this issue. It is, therefore, concluded that under the present state of Board law, the Trial Examiner is precluded from recommending the issuance of the requested order. Moreover, contrary to the Union's contention, it cannot be said that this case involves such a flagrant violation of the law, not to say "massive" or "aggravated" unfair labor practices, as to warrant such a drastic remedy. The *Huttig* and *Schill Steel* cases,[24] cited by the Union are inapposite, since in those cases the parties had ac-

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[21]*International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 426 F.2d 1243 (C.A. D.C.) (1970).

[22]*Ex-Cell-O Corporation*, 185 NLRB No. 20. See also *Sayers Printing Company*, 185 NLRB No. 120, enf'd, as mod., ... F. 2d .... (C.A. 9) (December 31, 1971).

[23]*H. K. Porter Company, Inc., etc. v. N.L.R.B. et al.*, 397 U.S. 99 (1970).

[24]*N.L.R.B. v. Huttig Sash & Door Co.*, 362 F.2d 217 (C.A. 4); *Schill Steel Products, Inc.*, 161 NLRB 939. Cf. *N.L.R.B. v. Strong*, 393 U.S. 357.

tually reached an oral agreement with the Union but had refused to sign the agreement. There is no contention here that the parties had reached agreement on wages, hours, and other terms and conditions of employment, at the time Respondents withdrew recognition from the Union. The *Warehousemen's* case[25] cited by the Union, does not warrant a different conclusion.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following:

Conclusions of Law

1. San Luis Obispo County and Northern Santa Barbara County Restaurant and Tavern Association, Respondent Association herein, and the Employers whose names appear in the caption of the complaint, Respondent Employers herein, are and at all times material herein have been an employer within the meaning of Section 2(2), and have, and at all times material herein have been, engaged in commerce and in business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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[25] *N.L.R.B. v. Warehousemen's Union Local 17, International Longshoremen's and Warehousemen's Union,* .... F.2d .... (C.A. 9) No. 23345, December 1, 1971, 78 LRRM 3056, in which the Union was found to have acted in bad faith, by refusing to sign a contract which embodied an oral agreement reached with the employer. The Court held that "the board's order awarding compensatory damages to the company was a reasonable exercise of the board's Section 10(c) power to make whole the victim of an unfair labor practice." The present case is distinguishable on the ground that it is undisputed that no complete oral contract had been reached between the parties at the time Respondents withdrew recognition from the Union.

2. Culinary Alliance and Bartenders Union, Local 703, AFL-CIO, the Union herein, is and at all times material herein has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, all kitchen, dining room, bar and fountain employees employed by Respondent Employers at their restaurants located in San Luis Obispo County, California, and Santa Barbara County, California, excluding office clerical employees, guards and supervisors as defined in the Act, have constituted a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been the exclusive representative of the employees in the unit described above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By withdrawing recognition from the Union as exclusive bargaining agent of the employees in an appropriate unit, on May 24, 1971, and failing and refusing to bargain with said Union, and by unilaterally granting the employees increased benefits in the retirement plan without prior negotiations with the Union, Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By withdrawing recognition from the Union on and after May 24, 1971, and failing and refusing to bargain with said Union as exclusive representative of

their employees in an appropriate unit, Respondents have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7, and have thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.[26]

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, the Trial Examiner hereby issues the following recommended:[27]

ORDER

San Luis Obispo County and Northern Santa Barbara County Restaurant and Tavern Association of San Luis Obispo and Santa Maria, California, Respondent Association herein, its officers, agents, successors, and assigns, and Anderson Hotel, Carl's Spanish Seas, Corcoran's, Airporter Inn, d/b/a Lions Inn, Best Ever Grill, Gordon's Restaurant, East Donovan House, d/b/a Rancho Bowl, The Silent Woman, Inc., d/b/a Laguna Village Inn and The Silent Woman, Fisher's Steak House, Farley's Jr., Little Chef Restaurant, Laurel Bowl, Post Houses, Inc., d/b/a Greyhound Post House, Russell's Restaurant, Smile Inn Cafe,

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[26]Inasmuch as Respondent Association was the authorized representative of Respondent Employers, employer-members of the Association, Respondent Association's unfair labor practices are equally attributable to Respondent Employers under general principles of agency.

[27]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Rancho San Luis Coffee Shop, Sam's Restaurant, Merrell's Steak House, Bull's Tavern, of San Luis Obispo and Santa Barbara Counties, their respective officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to recognize and bargain collectively with the Union as the exclusive bargaining representative of all the employees in the appropriate unit described above with regard to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) Unilaterally, and without prior notice to and consultation with the Union, effecting changes in the terms and conditions of employment of its employees in the appropriate unit, including any pension or retirement plans.

(c) In any like or similar manner, interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively with representatives of their own choosing or to engage in other concerted activities for the purposes of mutual aid or protection or to refrain from any and all such activities, as guaranteed by Section 7 of the National Labor Relations Act, as amended, except as permitted in the proviso of Section 8(a)(3) of the Act.

2. Take the following affirmative action, which it is found, will effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Culinary Alliance and Bartenders Union Local 703, AFL-CIO, as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, hours of employment, and other terms

and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at their respective places of business in San Luis Obispo and Santa Barbara Counties, California, copies of the attached notice marked "Appendix."[28] Copies of said notice on forms provided by the Regional Director for Region 31, shall, after being duly signed by Respondents' respective authorized representatives, be posted by them immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of receipt of this decision, what steps Respondents have taken to comply herewith.[29]

Dated:

/s/ Irving Rogosin
Irving Rogosin
Trial Examiner

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[28]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[29]In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith."

APPENDIX

Notice to
Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT fail and refuse to recognize and bargain with the Culinary Alliance and Bartenders Union Local 703, AFL-CIO, as the exclusive representative of our employees in an appropriate unit described below.

WE WILL NOT unilaterally and without prior notice to and consultation with said Union, effect changes in the terms and conditions of employment of our employees in the appropriate unit.

WE WILL NOT in any like or similar manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union or any other labor organization, to bargain collectively with representatives of their own choosing, or to engage in other concerted activities for the purpose of mutual aid or protection, or to refrain from any or all such activities, as guaranteed by Section 7 of the National Labor Relations Act, as amended, except as permitted by the proviso to Section 8(a)(3) of the Act.

WE WILL, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, hours of employment and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate unit is:

All kitchen, dining room, bar and fountain employees employed by the employers named below, at their restaurants located in San Luis Obispo County, California, and Santa Barbara County, California, excluding office clerical employees, guards and supervisors as defined in the Act.

SAN LUIS OBISPO COUNTY AND NORTHERN SANTA BARBARA COUNTY RESTAURANT AND TAVERN ASSOCIATION
(Association)

Dated ..... By .....
(Representative) (Title)
ANDERSON HOTEL
(Employer)

Dated ..... By .....
(Representative) (Title)
CARL'S SPANISH SEAS
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone Number: (213) 688-5200.

APPENDIX

Notice to Employees Posted by Order of the National Labor Relations Board An Agency of the United States Government

CORCORAN'S
(Employer)

Dated ..... By .....
(Representative) (Title)

AIRPORTER INN, d/b/a
LIONS INN
(Employer)

Dated ..... By .....
(Representative) (Title)

BEST EVER GRILL
(Employer)

Dated ..... By .....
(Representative) (Title)

GORDON'S RESTAURANT
(Employer)

Dated ..... By .....
(Representative) (Title)

EAST DONOVAN HOUSE,
d/b/a RANCHO BOWL
(Employer)

Dated ..... By .....
(Representative) (Title)

THE SILENT WOMAN, INC. d/b/a
LAGUNA VILLAGE INN AND
THE SILENT WOMAN
(Employer)

Dated ..... By .....
(Representative) (Title)

FISHER'S STEAK HOUSE
(Employer)

Dated ..... By .....
(Representative) (Title)

FARLEY'S JR.
(Employer)

Dated ..... By .....
(Representative) (Title)

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APPENDIX

Notice to
Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

LITTLE CHEF RESTAURANT
(Employer)

Dated ..... By .....
(Representative) (Title)

LAUREL BOWL
(Employer)

Dated ..... By .....
(Representative) (Title)

POST HOUSE, INC., d/b/a
GREYHOUND POST HOUSE
(Employer)

Dated ..... By .....
(Representative) (Title)

RUSSELL'S RESTAURANT
(Employer)

Dated ..... By .....
(Representative) (Title)

SMILE INN CAFE
(Employer)

Dated ..... By .....
(Representative) (Title)

RANCHO SAN LUIS
COFFEE SHOP
(Employer)

Dated ..... By .....
(Representative) (Title)

SAM'S RESTAURANT
(Employer)

Dated ..... By .....
(Representative) (Title)

MERRELL'S STEAK HOUSE
(Employer)

Dated ..... By .....
(Representative) (Title)

BULL'S TAVERN
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an Official Notice and Must Not Be Defaced by Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone Number: (213) 688-5200.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1556

CULINARY ALLIANCE & BARTENDERS UNION LOCAL 703, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board's Trial Examiner found that an association of employers in the restaurant industry violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from the petitioner union without establishing, on the basis of objective considerations, that it had a good faith doubt as to the union's continued status as representative of a majority of the employees in the bargaining unit (Pet. App. 30-41, 45-46). He ordered the association, *inter alia,* to recognize, and upon request to bargain with, the union (Pet. App. 47). The Trial Examiner, however, declined the union's request that the employees be compensated for the wage increases and fringe benefits which arguably they would have obtained but for the unlawful refusal to bargain (a "make-whole remedy"). He noted that the Board, in

Ex-Cell-O Corp., 185 NLRB 107, had concluded that it lacked statutory authority to provide such a remedy (Pet. App. 43). He added (*ibid.*):

> Moreover, contrary to the Union's contention, it cannot be said that this case involves such a flagrant violation of the law, not to say "massive" or "aggravated" unfair labbor practices, as to warrant such a drastic remedy * * *.

The Board affirmed the Trial Examiner's findings and conclusions, and adopted his order (Pet. App. 14-15).

2. The association complied with the Board's order. The union, however, petitioned the court of appeals to review the Board's refusal to grant the make-whole remedy. The court of appeals, while reserving "the question whether the Board has the power to award such a remedy for the case in which make-whole relief would be appropriate," affirmed "the conclusion of the Board that the facts of this case do not call for a compensatory-damages remedy" (Pet. App. 5). The court noted that the Court of Appeals for the District of Columbia Circuit, which first suggested that the Board has power to provide that remedy,[1] had recognized that this remedy need not be provided "where the legality of an employer's refusal to bargain rested on a factually debatable question" (Pet. App. 4). The court added (*ibid.*):

> Here, the Board found that, while the association did not entertain a good-faith doubt of the union's majority status on the date it withdrew recognition,

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[1] See *Int'l Union of Electrical Workers* v. *National Labor Relations Board (Tiidee Products)*, 426 F. 2d 1243, certiorari denied, 400 U.S. 950.

> the association's initial impression of widespread employee dissatisfaction was borne out when approximately 94 of the 304 employees wrote letters and signed petitions disavowing the union. Under these circumstances, the Board properly could find that the association's refusal to bargain was not a "clear and flagrant violation of the law." *Tiidee Products,* 426 F. 2d at 1248. * * *

3. The first issue raised in the petition (Pet. 3)—the Board's alleged failure to state its reasons for declining to grant a make-whole remedy—is not presented here. The Trial Examiner, whose findings the Board adopted, denied a make-whole remedy on two grounds: (1) the Board lacked power to provide such a remedy; and (2) in any event, such a remedy was inappropriate in this case because the unfair labor practices were not "flagrant." The court of appeals did not reach the first ground,[2] for it found that the Board was justified in declining a make-whole remedy on the second ground.

Accordingly, the only issue really presented is whether the Board was reasonable in concluding that a make-whole remedy was not appropriate here. Such an issue, which turns on an evaluation of the particular facts, does not warrnt review by this Court. In any event, the Board's conclusion was reasonable (see *supra,* p. 2).

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[2]Thus, the second question raised by the petition (Pet. 3)—whether the Board has power to provide a make-whole remedy—is likewise not presented here because the Board found that the remedy would be inappropriate in the circumstances of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1974.